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THE

ONTARIO REPORTS,

VOLUME XXVI.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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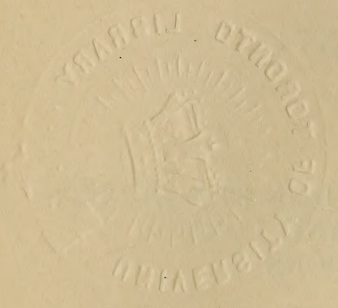
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OF THE
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

Page 115, headlines, for sec. "113" read "13."

Page 247, line 6 from bottom, for "237" read "37."

Page 298, headlines, for "ch. 20, sec. 3," read "ch. 26, sec. 3."

Pages 314 and 315, lines 1 and 8, for "contract" read "contest."

Page 353, line 14 from bottom, for "Nelson" read "Wilson."

Page 508, in headlines and headnote, and at page 510, line 3 from bottom, for "R. S. O. ch. 195," read "R. S. O. ch. 215."

Page 583, line 17, for "them" read "us."

Page 653, line 15 from top, for "111" read "III."

Page 667, headnote, line 6, for "he" read "it."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

RE CUMMINGS AND COUNTY OF CARLETON ET AL.

*Prohibition—Arbitration and Award—Municipal Corporations—Bridges
—Approaches—Lands Injuriouslly Affected—Compensation—Liability
—City and County—55 Vict. ch. 42, secs. 391, 530, 532, 535 (O.).*

Where a bridge over a river, which formed the boundary line between a city and a township, within a county, was erected by the councils of the city and county jointly, and in raising the approaches on the township side certain lands were injuriously affected, for which the owner claimed compensation :—

Held, having regard to secs. 530, 532, and 535 of the Municipal Act, 55 Vict. ch. 42, that the county only could be compelled to arbitrate in respect of such compensation.

Pratt v. City of Stratford, 16 A. R. 5, followed :—

Held, also, that sec. 391 did not apply to permit an arbitration between the land-owner and the city and county together, nor was such an arbitration otherwise provided for by law.

Prohibition against proceeding with such an arbitration.

Decision of *BOYD, C.*, 25 O. R. 607, reversed.

AN appeal by the corporations of the city of Ottawa and the county of Carleton from the order and decision of *BOYD, C.*, 25 O. R. 607, dismissing a motion for an order prohibiting William Whillans, John Deacon, and James Reeves, and each of them, and Robert Cummings, from proceeding with an alleged arbitration between Robert Cummings and the two corporations, the appellants. The facts are stated in the former report. Statement.

Argument.

The appeal was argued before a Divisional Court of the Queen's Bench Division (ARMOUR, C. J., and FALCONBRIDGE, J.) on the 21st November, 1894.

Moss, Q. C., for the corporation of the city of Ottawa. It should have been made to appear before the County Judge that the claim was for more than \$1,000, a city being concerned: section 487 of the Municipal Act, 1892. The Chancellor says that section applies where a city alone is concerned, but that is too narrow a construction. We contend that there is no remedy by arbitration in this case, but only by action. *Pratt v. City of Stratford*, 14 O. R. 260, 16 A. R. 5, does not apply, and is, besides, inconsistent with *City of New Westminster v. Brighouse*, 20 S. C. R. 520. Here the bridge was built by the city and county jointly: see *Regina v. County of Carleton*, 1 O. R. 277; while the lands are in the county exclusively; and Cummings claims compensation from the city and county jointly. The bridge was not constructed under the provisions of any by-law. It is, therefore, not a case for arbitration, but for action. See *Corporation of Parkdale v. West*, 12 App. Cas. 602. Even if *Pratt v. City of Stratford* is not affected by *City of New Westminster v. Brighouse*, it does not apply, because the lands in question are outside of the municipality. The whole question is whether these proceedings are within the Municipal Act. No language is used anywhere in the Act which covers the case of two corporations. Section 483 provides for compensation where lands are injuriously affected by the exercise of the powers of a municipal corporation; an action would lie to enforce that duty: *Corporation of Raleigh v. Williams*, [1893] A. C. 540. Sections 385-396 are the clauses regulating the appointment of arbitrators. Section 391 is not applicable to this case, for here are two corporations, no by-law, and the lands not in the municipality. Nor can that section be made applicable by reading the plural for the singular, for the notice served calls on each or both to appoint an arbitrator. Section 394, under which the County Judge assumed to act, deals with the subject in the same way, providing that if the party neglects to

appoint an arbitrator, the Judge may appoint. Section 393 deals with the case of several landowners, but they are to get twenty-one days' notice, whereas here the two corporations had only seven days' notice. The Judge had no authority at all where compensation had been claimed from two corporations, or, if he had any, he could exercise it only by appointing an arbitrator for each. But we contend section 487 does apply, and the Judge had no jurisdiction until it was shewn that over \$1,000 was claimed. Similar language was used in the Streams Act, and see *McLaren v. Caldwell*, 6 A. R. 456; 9 App. Cas. 392, 410. The claim here is against a city, if against a city and another jointly. Under section 394 it should have appeared that there was a disagreement as to the compensation; under section 488 a corporation has a right to make an offer. A release was given by Cummings in respect of his interest, and that could be got rid of only by action. That may not be a ground for prohibition, but it has a bearing on the circumstance that no notice of the application to the County Judge was given. As to his power to proceed *ex parte*, the Chancellor relies on *Re Smith and Plympton*, 12 O. R. at p. 36; but I contend that case was not well decided.

H. M. Mowat, for the corporation of the county of Carleton. Seven days' notice was too short. The county is large, and it would be impossible to call the council together and act within that time. The county authorities were certainly under the impression that they had settled with Cummings, and should have had an opportunity to shew this before the County Judge. The injury, if any, to Cummings' lands was done by raising the road. It is a township road. The county council have not exercised any power; the building of a bridge is a liability imposed upon them. *Pratt v. City of Stratford*, 14 O. R. 260, 16 A. R. 5, does not apply, because we are not raising our own road, but a township road.

Chrysler, Q.C., for Robert Cummings. If the notice to the corporations was not sufficient, it could not abridge the time they had by law. At all events, the appli-

Argument.

Argument. cation for the appointment of an arbitrator was not made for two months after notice was served. There is no merit in that objection. The statute does not say it is necessary to shew there has been a disagreement as to compensation. By section 532 the jurisdiction over the bridge is in the county; but the ownership is that of the city and county jointly. See section 530 as to the approaches.

W. M. Douglas, on the same side. In reference to the application to the County Judge being *ex parte*, see *Briton Medical Association v. Asher*, 35 Sol. J. 262. The corporations took the attitude of having nothing to do with the arbitration. The validity of the alleged release could be determined in the arbitration proceeding, if necessary: see *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408. At any rate, the questions of the notice and release do not go to the jurisdiction. The arbitrator for the corporations was not appointed joint arbitrator; but the same arbitrator was appointed for both corporations. Wherever the jurisdiction is, there is no difference as to the duty cast upon the corporations, and where they act in the performance of that duty, we are entitled to invoke the arbitration clauses of the Municipal Act. *Pratt v. City of Stratford*, 14 O. R. 260, 16 A. R. 5, is approved in *City of New Westminster v. Brighthouse*, 20 S. C. R. 520.

December 7, 1894. The judgment of the Court was delivered by

ARMOUR, C. J.:—

By section 532 of the Consolidated Municipal Act, 1892, it is provided that the county council shall have exclusive jurisdiction "over all bridges over rivers or ponds or lakes forming or crossing boundary lines between two municipalities."

And by section 535 of the said Act it is provided that "it shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines

between two municipalities (other than in the case of a Judgment. city or separated town) within the county; and in case of Armour, C.J. a bridge over a river forming or crossing a boundary line between two or more counties or a county, city or separated town, such bridge shall be erected and maintained by the councils of the counties or county, city and separated town respectively; and in case the councils fail to agree as to the respective portions of the expense to be borne by the municipalities interested, it shall be the duty of each to appoint arbitrators as provided by this Act, to determine the proportionate amount to be paid by each, and the award made shall be final."

And by section 530 it is provided that "the approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by such municipality or municipalities: the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate."

There is nothing in section 535 which has the effect of divesting the county council of the exclusive jurisdiction conferred upon it over all bridges over rivers or ponds or lakes forming or crossing boundary lines between two municipalities, by section 532.

And although, in case of a bridge over a river forming or crossing a boundary line between a county, city or separated town within the county, such bridge shall be erected and maintained by the councils of the county, city and separated town respectively, each contributing such portion of the expense thereof as may be agreed upon or determined by arbitration, yet the exclusive jurisdiction over such bridge so erected and maintained still remains in the county council.

And although such bridge is to be so erected and maintained, yet the approaches for 100 feet to and next adjoining each end of such bridge are, by the provisions of section 530, to be kept up and maintained by the county

Judgment. council, under whose exclusive jurisdiction such bridge is
Armour, C.J. declared to be by section 532.

The bridge in question, being a bridge over the River Rideau, which forms the boundary line between the two municipalities, within the county of Carleton, of the township of Gloucester and the city of Ottawa, is under the exclusive jurisdiction of the county council of the county of Carleton; but one of these municipalities being a city, such bridge is to be erected and maintained by the councils of the county of Carleton and of the city of Ottawa, each contributing such portion of the expense thereof as may be agreed upon or determined by arbitration, and the approaches for 100 feet to and next adjoining each end of such bridge are to be kept up and maintained by the county of Carleton.

This bridge has been erected by the councils of the county of Carleton and of the city of Ottawa, and the approaches have been made, but the bridge having been erected upon a higher level than the previously existing bridge, it was necessary to raise the approaches, and what Cummings complains of is that in raising the approach to the bridge on the Gloucester side of the river, certain lands of his in the township of Gloucester were injuriously affected, and he claims compensation therefor. The duty of keeping up and maintaining this approach being cast, as I have shewn, by law upon the county of Carleton, the claim made by Cummings for compensation must be made against the county of Carleton, and it is the county of Carleton alone which can be compelled to arbitration in respect of such compensation, and that the county of Carleton can be compelled to arbitration in respect thereof, *Pratt v. City of Stratford*, 16 A. R. 5, is sufficient authority.

The proceedings taken by Cummings were, however, against both the county of Carleton and the city of Ottawa jointly, and were, therefore, erroneous, and the appointment of an arbitrator on behalf of both corporations by the County Judge was without jurisdiction, not only because the city of Ottawa could not be compelled by law to arbi-

tration in respect of the compensation for the alleged Judgment. injury, but because no provision is made by law for any Armour, C. J. such arbitration as Cummings was seeking to have held.

Section 391 of the Consolidated Municipal Act, 1892, does not in terms apply to permit such an arbitration, and to read it so as to make it apply is, in my opinion, beyond judicial power and inconsistent with other provisions of the Act, such as section 487.

In my opinion, further proceedings in the attempted arbitration should be prohibited, but this will not prevent Cummings from commencing and prosecuting proceedings *de novo* against the county of Carleton alone to compel arbitration in respect of such compensation, and in such arbitration the county of Carleton will be at liberty to shew, if it can, with any other defence it may make, that compensation has already been made to Cummings for the injury alleged: see section 487 (a.)

As no costs were given in the Court below, we, for a like reason, give no costs here.

I refer to *Regina v. County of Carleton*, 1 O. R. 277; *Traversy v. Gloucester*, 15 O. R. 214; *Pratt v. City of Stratford*, 14 O. R. 260, 16 A. R. 5.

E. B. B

[QUEEN'S BENCH DIVISION.]

NELLIGAN V. NELLIGAN.

Alimony—R. S. O. ch. 44, sec. 29—Restitution of Conjugal Rights—Cohabitation.

The only bar, under sec. 29 of R. S. O. ch. 44, to an action for alimony against a husband who is living separately from his wife, is cruelty or adultery on the part of the applicant.

Where a husband, who had been insane for years, at intervals, and during such periods of insanity had been confined in an asylum, afterwards declined to live with his wife, being under the suspicion that by doing so he might again be confined in an asylum :—

Held, that she was entitled to alimony, as, upon the evidence, he was living separate from her without any sufficient cause, and under such circumstances as would have entitled her by the law of England, as it stood on 10th June, 1857, to a decree for restitution of conjugal rights. Judgment of BOYD, C., reversed.

Statement. AN action brought by Mary Nelligan, against her husband, Joseph Nelligan, for alimony, tried before BOYD, C., at Ottawa.

The plaintiff was called as a witness and said that she was married to the defendant in 1868; that she lived happily with him until 1885, and had nine children by him; that in June, 1882, he was taken ill with epileptic fits, which returned at intervals during the next two years, until, in May, 1884, he went out of his mind; in about a month he recovered, but again became insane in January, 1885, when he was taken to an asylum for the insane at Kingston; he remained there about eighteen months, when he recovered and returned home, and again lived happily with the plaintiff for about seven weeks, at the expiration of which time he again became insane and violent, and was taken back to the asylum; he remained there for about four years, until July, 1890; in that month she learnt that he had escaped from the asylum, and a month or two afterwards she met him by chance in the street, and he went back with her to the house where she was then living; he then said he did not intend to remain with her, and she did not ask him to remain; he only stayed about half an hour; he said he would not stay in Canada; she never

saw him again until February, 1894, when he came to the house she was then living in ; all the time he was away she never knew where he was ; he never wrote to her ; she heard about him through his brother, but never heard what his address was ; when he called at her house in February, 1894, he stayed only half an hour ; she three times asked him to stay, but he said he could not ; on the evening of the same day he returned and stayed a couple of hours ; she did not then ask him to stay ; he came again the next morning, and again some days afterwards, but never stayed in the house ; after that it was two or three months before he came again ; at this time he was staying at a boarding-house or hotel in the place (Ottawa) where the plaintiff lived ; she went to see him at this house several times, and asked him to return with her to a farm which belonged to him, and which was rented, but he declined to go with her, or to return with her to the house in which she lived in Ottawa. The plaintiff said she was willing to go and live with the defendant or have him live with her. Statement.

Mr. Orde, the plaintiff's solicitor, was called as a witness, and said that on the 5th May, 1894, before action, he wrote a letter to the defendant in consequence of instructions received from the plaintiff ; that two days afterwards the defendant called at witness's office and asked what the letter meant ; witness explained the plaintiff's position, and that it was the defendant's duty to try to support her, and that she could not understand why he had refused to stay with her instead of going and boarding by himself ; defendant said he intended to rent a farm and to take his children, but not his wife, to live with him. On cross-examination Mr. Orde said that he did not know until 1st February, 1894, that the defendant was not still a patient in the asylum ; that when witness asked the defendant why he did not stay with his wife, he used the expression that a burnt child dreaded the fire ; he seemed to be afraid that something might be done to take him back to the asylum ; he seemed to be of opinion that he had been adjudged a lunatic in some way, and that his appearing

Statement. here again might cause his going back to the asylum—that he was liable to be arrested as an escaped lunatic; “a burnt child dreads the fire” seemed to be a favourite expression of his, and witness understood that to mean that he was afraid to go back to live with his wife, because he was afraid she would put him in the asylum; that the plaintiff had told witness a story about her locking the front door of her house, when the defendant was in it, and taking out the key in order to keep defendant’s brother out, and that defendant, on that occasion, struck her, but that he did not do it deliberately, and she thought it was accidental, and did not complain of it in this action.

R. G. Code and Orde, for the plaintiff.

Chrysler, Q.C., and *J. Travers Lewis*, for the defendant.

October 15, 1894. BOYD, C.:—

This claim of the plaintiff is not based upon any cruelty from the husband to the wife. The separation arose because his mind became alienated so that he was taken to an asylum. The only cruelty I can see in the case is the wife’s attempt now to coerce him by the process of the Court to pay money, which may have the effect of sending him again to the asylum, if he has not permanently recovered. The law separated them because he became alienated in his mind. There was so little concern taken on her part as to his whereabouts that it was supposed by everybody until February of this year, 1894, that he was still in the asylum. He removed that impression by presenting himself, and then came this attempt to live with him which the wife speaks of.

Now, she may have made advances to him in perfect good faith; I am not in a position to judge one way or the other as to that; but he received her advances with suspicion, and that suspicion has not been removed from his mind to the present time. He disclosed precisely his attitude towards her on the receipt of what is commonly

called the lawyer's letter, written on the 5th May, 1894, received by him some time afterwards, I don't know how long; but certainly that letter was received, and the conversation which we have heard of from Mr. Orde was had, considerably after the last time he spoke with her; and she traces events down, without giving the dates, but, as she puts it in her evidence, the last conversation was some time in the spring. She asked if he was going to do anything for the maintenance of the children, and again he answered her that he would go where he liked, and would do as he liked, and it was none of her business. He seems to have been suspicious of her; I do not know whether with or without reason; but the conduct of which we hear, the transaction we hear of as having taken place the day before he went to see Mr. Orde, would strengthen the impression which he had formed that she was going to put him back in the asylum. He was out of the asylum; he did not want to return there. He felt he was a perfectly cured man, but he had the impression, as Mr. Orde told us, that being once adjudged a lunatic by the Court, he was liable to be arrested afterwards. Mr. Orde understood from him that he was afraid to go back to live with his wife lest she might send him back to this place from which he was delivered. Her conduct, when he went there the day before the interview, when she locked the door on him when he was upstairs, locked the door behind his back, locking his brother outside, and keeping him inside, led him to believe that was part of the scheme, and she was obliged, from his violence, to let him out, and then this occurrence happened in which he struck her, but she does not allude to that as an act of cruelty, nor to any act of cruelty on which she can rely.

Therefore, it all comes back to the attitude of the parties at the time this letter was written on the 5th May; the conversation, the invitation of the wife, and the refusals by the husband, all took place before that; but the whole thing is elucidated by the aspect of the husband's mind towards his wife, which shews that he is not refusing

Judgment.

Boyd, C.

Judgment. because he does not want to live with her, but because he
Boyd, C. is under the apprehension that he would endanger his liberty if he went back to live with her.

While he is in that condition, it is idle to come to this Court to get a decree against him. Her way is to win him by love, and shew that she really cares for him, and regain his affection, which I do not think she at present has. I think he is at present in an attitude of suspicion towards her. Certainly the Court is not going to put him in a worse plight by giving a decree under this state of facts.

Action dismissed. No order as to costs.

At the Michaelmas Sittings of the Divisional Court, 1894, the plaintiff appealed from this judgment, upon the grounds :—

1. That by section 29 of the Judicature Act, the High Court of Justice has jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and the evidence adduced for the plaintiff at the trial was such as would entitle her in England to a decree for restitution of conjugal rights, or to a decree for alimony.

2. That no evidence was adduced to shew that the plaintiff had been guilty of or had committed any act which would disentitle her to alimony under section 29 of the Judicature Act.

3. That, in the absence of evidence of any such act, neither the condition of the defendant's mind, nor the fact that he was not in the receipt of any income at the commencement of or during the action, could be a defence to the action, and the trial Judge erred in holding that either or both of such grounds were sufficient to disentitle the plaintiff to alimony, nor was there any or sufficient evidence to justify such holding.

And upon other grounds.

November 20, 1894. The appeal was argued before Argument.
 ARMOUR, C. J., and FALCONBRIDGE, J.

Orde, for the plaintiff, referred to Browne & Powles' Law of Divorce, 5th ed., p. 134; *Barlee v. Barlee*, 1 Add. 301; Bishop on Marriage, Divorce, and Separation (ed. of 1891), vol. 1, secs. 1662, 1696; Dixon's Law of Divorce, 2nd ed., pp. 127-8; *Bramwell v. Bramwell*, 3 Hagg. E. R. 618, 635; *Burroughs v. Burroughs*, 2 Sw. & Tr. 303; *Sopwith v. Sopwith*, *ib.* 160; *Yeatman v. Yeatman*, L. R. 1 P. & D. 489; *Read v. Legard*, 6 Ex. 636; *Marshall v. Marshall*, 5 P. D. 19; *Severn v. Severn*, 3 Gr. 431; *McKay v. McKay*, 6 Gr. 380; *English v. English*, *ib.* 580; *Weir v. Weir*, 10 Gr. 565; *Cronk v. Cronk*, 19 Gr. 283; *Edwards v. Edwards*, 20 Gr. 392.

Chrysler, Q. C., for defendant. This is not a question of law, but a question of fact, decided upon by the Chancellor on the evidence of the plaintiff herself and her own solicitor. I submit that upon the ordinary rule his decision should not be interfered with.

Orde, in reply.

December 7, 1894. The judgment of the Court was delivered by

ARMOUR, C. J.:—

R. S. O. ch. 44, sec. 29, provides that "the High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights."

The provision giving jurisdiction to grant alimony to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would

Judgment. entitle her, by the law of England, to a decree for restitution of conjugal rights, first became the law of this Province on the 10th of June, 1857, by virtue of the Act 20 Vict. ch. 56, sec. 2.

At which time the jurisdiction over suits for the restitution of conjugal rights was exerciseable by the ecclesiastical Court in England.

The ecclesiastical Court could only interfere in the way of restitution where matrimonial cohabitation was suspended, that is, where either party refused to live with the other without sufficient cause.

And to a suit for the restitution of conjugal rights there was no bar or legal opposition except cruelty or adultery on the part of the promoter.

And the single duty which the Court could enjoin by its decree in such a suit was that of married parties living together : Burn's Ecclesiastical Law, 9th ed., vol. 2, p. 500*b* ; Coote's Eccl. Practice, p. 361 ; *Weldon v. Weldon*, 9 P. D. 52.

It is clear upon the evidence that the defendant, the plaintiff's husband, was living separate from the plaintiff without any sufficient cause and under circumstances which would entitle her, by the law of England as it existed on the 10th day of June, 1857, to a decree for restitution of conjugal rights.

I see no reason, therefore, why the plaintiff was not entitled to alimony.

The usual decree for alimony will, therefore, be made with costs.

E. B. B.

[QUEEN'S BENCH DIVISION.]

RE LONDON MUTUAL FIRE INSURANCE COMPANY
OF CANADA V. MCFARLANE ET AL.*Prohibition—Division Court—Right to Jury—Action of Tort—R. S. O. ch.
51, sec. 154.*

A claim by an insurance company, as indorsed on a Division Court summons, to recover back from the insured the sum of \$30 loss under an insurance effected by him, payment of which is alleged to have been procured by his false and fraudulent representations, is a claim arising *ex delicto*, and can be required to be tried by a jury under R. S. O. ch. 51, sec. 154.

THE plaintiffs on the 15th June, 1894, caused a special Statement.
summons to be issued out of the 4th Division Court in the county of Middlesex, against the defendants, claiming from them the sum of \$30, as shewn by the particulars of their claim annexed to the summons, which were as follows:—

“The plaintiffs claim to recover from the defendants the sum of \$30, under the following circumstances: (1) The defendants made an application to the plaintiffs on the 24th October, 1891, for insurance upon certain buildings and ordinary contents inside of the outbuildings. (2) The defendants in their said application covenanted and agreed that there was no other insurance on the said property, and the policy of insurance issued to the defendants was issued conditional upon the truth of the statements contained in the said application. (3) On or about the 15th July, 1893, the said defendants had a steer killed by lightning, which they claimed to be part of said ordinary contents. (4) The said steer was covered by a policy of insurance in the Caradoc Farmers' Mutual Fire Insurance Company at the time of the said application and of the loss, and the plaintiffs paid the defendants for their said loss the said sum of \$30. (5) The said insurance in the Caradoc Farmers' Mutual Fire Insurance Company was unknown to the plaintiffs at the time of the said application, at the time of the said loss, and at the

Statement. time of the said payment. (6) By reason of the said insurance in the Caradoc Farmers' Mutual Fire Insurance Company, there was a breach on the part of the defendants in the warranty contained in the said application, and thereby the said policy became null and void, and was no longer binding upon the plaintiffs. (7) On or about the 15th July, 1893, the said defendants, or one of them, falsely and fraudulently made a statutory declaration, pursuant to the statutory conditions, in which they, or one of them, swore that there was no insurance on the said steer other than that of the plaintiffs, and, in full confidence and reliance upon the said false and fraudulent statement, the plaintiffs paid the said sum of \$30. The plaintiffs, therefore, claim to recover from the said defendants the said sum of \$30."

The summons with these particulars was served upon the defendants on the 18th June, 1894; and on the 22nd June, 1894, the defendants left with the clerk of the 4th Division Court a notice disputing the claim and requiring a jury to be summoned to try the case.

On the 4th September, 1894, the plaintiffs applied to the Judge of the County Court for an order striking out and setting aside the application for jury and jury notice given by the defendants, and dispensing with the trial of the plaint by a jury; which application the Judge allowed, on the ground that the plaintiff's claim was not in tort, but in contract, and, as the amount claimed did not exceed \$30, the defendants could not require a jury.

Section 154 of the Division Courts Act, R. S. O. ch. 51, provides: "Either party may require a jury in tort or replevin where the sum or the value of the goods sought to be recovered exceeds \$20, and in all other cases where the amount sought to be recovered exceeds \$30."

The defendants thereupon applied to a Judge of the High Court in Chambers for a prohibition to the Judge of the County Court, to the clerk of the Division Court, and to the plaintiffs, prohibiting them from proceeding to

enforce the order made by the Judge, and from trying or causing the issues in the plaint to be tried without a jury, on the ground that the plaintiffs' claim being in tort and exceeding \$20, and the defendants having given the notice requiring a jury in the manner provided by the statute, the Judge had no jurisdiction to order the defendants' application for a jury to be set aside, or to try the plaint without a jury. Statement.

The application was heard by STREET, J., who made an order prohibiting the Judge and the clerk from proceeding in the suit and from trying or causing the same to be tried, with costs of the application to be paid by the plaintiffs.

At the Michaelmas Sittings of the Divisional Court, 1894, the plaintiffs appealed against the order of STREET, J., upon the grounds following:—

1. That the action or plaint in the Division Court was not an action of tort, but of contract, and the amount claimed not exceeding \$30, the defendants were not entitled to have it tried by a jury.

2. That if it was a case for prohibition at all, the order should not have been for total prohibition, but should have simply prohibited the Judge from acting upon the order striking out the jury notice, or directed him to try the action with a jury.

The appeal was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 20th November, 1894.

W. E. Middleton, for the plaintiffs. The action is *assumpsit*; the plaintiffs are seeking to get back money which the defendants, by fraud or deceit, induced them to pay. I refer to Chitty on Pleading, 7th Eng. ed., pp. 120, 154, 367; *Holt v. Ely*, 1 E. & B. 795; *Kelly v. Solari*, 9 M. & W. 54; *Crockford v. Winter*, 1 Camp. 124; *Williamson v. Allison*, 2 East 446. If the prohibition should be granted at all, it should be prohibiting the Judge from trying the action otherwise than with a jury.

Argument. *W. H. Blake*, for the defendants. The order prohibits the Judge from trying the action in the only way he will try it. The action is in tort. I refer to Addison on Torts, 7th ed., p. 794.

December 19, 1894. The judgment of the Court was delivered by

ARMOUR, C. J. :—

Section 154 of the Division Courts Act provides that “Either party may require a jury in tort or replevin where the sum or the value of the goods sought to be recovered exceeds \$20, and in all other cases where the amount sought to be recovered exceeds \$30;” and the summoning of a jury when so required is made imperative, upon payment of the proper fees.

The defendants duly required a jury in this case, and paid the proper fees, but the Judge ordered the notice given by the defendants requiring a jury to be struck out and set aside, holding that this was not an action of tort, and that the amount sought to be recovered did not exceed \$30, and that the defendants were not, therefore, entitled to require a jury.

Whether this is an action of tort must be determined by the particulars of the plaintiffs’ demand, for section 94 provides that “The plaintiff shall enter with the clerk a copy (and, if necessary, copies) of his account, claim or demand in writing in detail (and in cases of tort, particulars of his demand) * * and on the trial of the cause no evidence shall be given by the plaintiff of any cause of action except such as is contained in the account, claim or demand so entered.”

And looking at the particulars of the plaintiffs’ demand in this case, it seems clear that the cause of action therein set forth is the procuring by the defendants from the plaintiffs by false and fraudulent representations, upon which the plaintiffs relied, the sum of \$30.

Such a cause of action is one clearly arising *ex delicto*, Judgment.
and the action is, therefore, one of tort. Armour, C.J.

The learned Judge of the County Court having struck out and set aside the notice given by the defendants requiring a jury, the learned Judge in Chambers was right in prohibiting the learned Judge of the County Court from proceeding in the said suit so amended, and from trying or causing the same to be tried.

The motion must, therefore, be dismissed with costs.

E. B. B.

[QUEEN'S BENCH DIVISION.]

HAIST V. GRAND TRUNK RAILWAY COMPANY.

*Negligence—Railways—Contributory Negligence—Settlement before Action
—Payment—Receipt—Evidence—Accord and Satisfaction—Release—
Estoppel—Nonsuit.*

In an action for damages for negligence, whereby the plaintiff was injured in alighting from a train, the defendants denied negligence and pleaded contributory negligence, and also a payment of \$10 to the plaintiff before action and a receipt in writing signed by him therefor, "in lieu of all claims I might have against said company on account of an injury received * * * by reason of my stepping off a train * * *"; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees." The plaintiff replied that if he signed the receipt, he was induced to do so by fraud and undue influence:—

Held, that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence, and should have been submitted to the jury, and not separately tried by the Judge.

Johnson v. Grand Trunk R. W. Co., 25 O. R. 64, 21 A. R. 408, distinguished.

The document would not support a plea of accord and satisfaction, nor of release, nor did it operate by way of estoppel.

Judgment of STREET, J., reversed.

THIS was an action for damages for personal injuries Statement.
alleged to have been sustained by the plaintiff when alighting from a train at Merritton station on the 6th May, 1893, owing to the alleged negligence of the defendants' servants.

Statement.

The statement of defence alleged : (1) That the allegations contained in the statement of claim were untrue. (2) That the plaintiff by his own carelessness, and acting contrary to the directions of the defendants' servants, etc., sustained the alleged injury. (3) That while the plaintiff was in the hospital at St. Catharines and after the alleged injury, he applied to the defendants for assistance, and represented that he had no claim upon them, and that the injury he had sustained was the result of his own acts, whereupon they gave him \$10, and he then made and signed a receipt in these words : " St. Catharines, 24th June, 1893. Received from the Grand Trunk Railway Company the sum of ten dollars, such amount being in lieu of all claims I might have against said company on account of an injury received at Merritton on the 6th day of May, 1893, by reason of my stepping off a train at said station ; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees. Henry Haist." (4) That the injuries mentioned in the receipt were the same as those set out in the statement of claim and none other.

The plaintiff replied denying the statements contained in the defence, and alleging that if he did sign the receipt mentioned, it was obtained from him through the fraud and undue influence of the defendants or their agents.

The action was tried before STREET, J., and a jury at the Welland Autumn Assizes, 1894.

Before the jury was called, counsel for the plaintiff asked the trial Judge not to sever the issues, but to have the whole case tried before the jury. The trial Judge decided to try the whole case together, but to leave to the jury only the questions which are ordinarily left to them to pass upon.

After the plaintiff had given his evidence, and again, when the evidence was all in, the plaintiff's counsel asked the trial Judge to leave the whole case to the jury, but he refused to do so, saying that he must follow the

example of Armour, C. J., in *Johnson v. Grand Trunk R. Co.*, 25 O. R. 64, 21 A. R. 408, and reserve to himself the question as to the settlement.

Accordingly the case went to the jury on the questions of negligence and contributory negligence, and the branch relating to the document was argued before the Judge.

The jury found in favour of the plaintiff on the issues submitted to them, with \$300 damages.

The trial Judge reserved his judgment, and afterwards gave it as follows (after setting out the facts):—

November 2, 1894. STREET, J.:—

The evidence is clear that the plaintiff from the time of the accident down to the time of the settlement, at all events, and, for all that appears to the contrary, down to the following February, when this action was begun, believed the accident to have been due to his own fault, and that he never suggested to any one that it was due to any negligence on the part of the defendants. He had told the station master this, and the nurse at the hospital, and the doctor who attended him, and who arranged the settlement with him. The plaintiff was the person who knew most about the cause of the accident; the persons to whom he stated that it was caused by his hastiness in getting off the train knew nothing of the facts, and may well be believed to have assented to his statements as to it. Therefore, when he asked the doctor, who was to his knowledge the doctor employed by the defendants, to try and get enough from them to pay for a suit of clothes, both he and the doctor, no doubt, supposed that in getting for him \$10 he was doing very well. If the \$10 had been simply handed to him as a gift or as charity, I could quite accede to the contention of the plaintiff's counsel that his receipt of it would be no bar to an action. But this was not the case; a condition was attached by the company to

Judgment. his receipt of the money that he should take it in full of
Street, J. any claim he might have against them in respect of the
accident. This condition as set forth in the receipt which
he signed, and which I have no doubt he understood, was
intelligible enough, and according to his own evidence he
appears to have had some slight hesitation as to whether
he should take the money upon the condition attached,
but he finally did take it, and became bound by the con-
dition. I can find no evidence whatever of any fraud or
imposition or unfair dealing of any kind on the part of the
defendants. It is plain that the plaintiff had laid before him
that he could not have the money without giving up any
possible claim that he might have against the company,
and that he knew he was only getting the money because
he asserted and, no doubt, believed that he had no claim.
He accepted with his eyes open the terms on which the
defendants offered him the money, and his evidence and
manner in the box gave me no reason to suppose that he
was not perfectly capable of understanding the bargain he
was making. It does not matter whether it is to be treated
as an estoppel, a release, or an accord and satisfaction;
both parties understood that any possible claim on his part
was ended and he ought to be held to it.

There must, therefore, be judgment for the defendants.

At the Michaelmas Sittings of the Divisional Court, 1894,
the plaintiff moved to set aside the judgment of STREET, J.,
and to enter judgment for the plaintiff for the amount of
damages assessed by the jury with costs, or, in the alterna-
tive, for an order for a new trial, on the ground that the
evidence did not shew that the document signed by the
plaintiff was given or signed as a release to the defendants,
and that it was not a sufficient and valid release; and on
the further ground that the question of the validity of the
release (if a release), or at least the issues of fraud and
undue influence, should have been left to the jury; and
that the paper signed by the plaintiff was not a release of
his cause of action and did not so operate, but was in law,

at the most, evidence of an accord and satisfaction, and as such should have been left to the jury as a matter of evidence for their consideration ; and that the whole defence should have been left generally to the jury instead of one branch of it separated for the decision of the Judge alone. Argument.

December 7, 1894. The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J.

Aylesworth, Q.C., for the plaintiff. There was mistrial. The document was not pleaded as a release, and was not in fact a release. The plea was accord and satisfaction, and the question should have been submitted to the jury : *Lee v. Lancashire, etc., R. W. Co.*, L. R. 6 Ch. 527, and cases there cited. (The learned counsel was here stopped by the Court.)

McCarthy, Q.C., for the defendants. *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408, authorizes the course taken by the trial Judge, and his decision may be supported on any of the following grounds, viz., that the document was a release, though not under seal ; that it was evidence of accord and satisfaction ; or that, under the circumstances, the plaintiff is estopped by it from making any claim. Even where the cause of action is vested there may be a good release not under seal if there is a valuable consideration : *Benjamin v. McConnell*, 4 Gilman (Ill.), 536, 545. Here a sum of money was paid for all claims. Second, the document shews a good accord and satisfaction. Third, and strongest of all, an estoppel arises. The plaintiff got the money on the representation that he had no cause of action. I refer to *Graves v. Key*, 3 B. & Ad. 313 ; *Taylor v. Manners*, L. R. 1 Ch. 48. I also maintain that there should have been a nonsuit, because of the express admission made by the plaintiff under his hand, and because there was no evidence of negligence, and it clearly appeared from the plaintiff's testimony that he was guilty of contributory negligence in jumping off the train too hastily. I refer to *Siner v. Great Western R. W. Co.*, L. R. 4 Ex. 117 ; *Harrold v. Great Western R. W. Co.*, 14 L. T. N. S.

Argument. 440; *Robson v. North Eastern R. W. Co.*, 2 Q. B. D. 85; 46 L. J. Q. B. 50; *Rose v. North Eastern R. W. Co.*, 2 Ex. D. 248; *Wright v. Midland R. W. Co.*, 51 L. T. N. S. 539; *Davey v. London and South Western R. W. Co.*, 11 Q. B. D. 213, 12 Q. B. D. 70; *Beven on Negligence*, pp. 667-675. *Cockle v. London and South Eastern R. W. Co.*, L. R. 7 C. P. 321, is distinguishable because there the danger was not apparent.

Aylesworth, in reply. I submit there is no right to ask for a nonsuit now. The question of negligence and the question of this alleged release were really tried separately by different tribunals. No exception was taken to the trial Judge's overruling the motion for nonsuit made to him. The defendants have given no notice of motion to this Court for a nonsuit, and it does not come up here on the evidence at all. The case was put to the jury as a case in which the evidence established that the train did not stop long enough. The moment the train stopped the plaintiff made all haste to alight. There was certainly evidence of negligence which it was impossible to withdraw from the jury. On the other question, I submit that there was no reason for withdrawing the question as to the document from the jury. It was not a question that could have been litigated in a separate action as in *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64, 21 A. R. 408.

December 19, 1894. FALCONBRIDGE, J.—(after setting out the facts):—

The defendants' pleading professes to "contain a concise statement of the material facts upon which they rely:" Rule 399: and one question is, how it is to be classified as an answer to the action?

It is not a release. A release of a cause of action once accrued must be by deed under seal: *Harris v. Goodwyn*, 2 M. & G. 405. A parol discharge of a cause of action (except in the case of a parol waiver of a bill or note) is available as a defence only when it forms part of a contract

made upon a good consideration and executed ; the defence then is accord and satisfaction.

Judgment.
Falconbridge,
J.

But neither is it accord and satisfaction, for it does not import that the defendants delivered to the plaintiff and the plaintiff accepted and received from them the sum of \$10 in full satisfaction and discharge of the cause of action in the statement of claim mentioned. On the contrary, it is a disclaimer of plaintiff ever having had any cause of action against defendants.

Mr. McCarthy urged that it would operate as an estoppel—the plaintiff having got the money on the representation that he had no claim. *Lee v. Lancashire, etc., R. W. Co., L. R. 6 Ch. 527*, shews that this is one of the matters which may be considered in the action, viz., if the plaintiff's mind went with the instrument. "A receipt not under seal has no such effect" (as a release), "but amounts simply to an acknowledgment, and has the same effect as if a man had written a letter saying that he had received a sum of money in satisfaction, or as if in the course of conversation he had mentioned he had received it in satisfaction—it is merely evidence of satisfaction, and liable to be rebutted by contrary evidence:" *per* Sir G. Mellish, L. J., at p. 534.

The fact that the writing is, therefore, a mere item of evidence proper to be considered by the jury in dealing with the whole matter distinguishes the case from *Johnson v. Grand Trunk R. W. Co., 25 O. R. 64*, and renders the course adopted there entirely inapplicable here.

Further, it had to be submitted to the jury, and it was so submitted by the learned Judge in his charge as follows: "Then you will consider also the words of the document which he signed, and which he says was not read over to him, but which the doctor swears was read over to him; and in that document which he signed by himself he says, 'Received from the Grand Trunk Railway Company the sum of \$10,' etc. (reads receipt.) There is a statement made over his own signature, at a time when matters were perfectly fresh in his recollection, that he had not received this

Judgment. injury on account of any negligence on the part of the
 Falconbridge, company, but by stepping off the train on his own account.”
 J.

And we have to assume that the jury did consider and take it into account.

I think there must be a new trial.

The learned Judge could not have withdrawn the case from the jury on either of the grounds relied on by defendants' counsel, either because of the receipt or that there was no evidence of negligence: *Edgar v. Northern R. W. Co.*, 11 A. R. 452. The plaintiff swears to a request on his part to have the train backed to the platform and to an invitation to alight by the brakesman, and the case is clearly distinguishable from cases like *Siner v. Great Western R. W. Co.*, L. R. 4 Ex. 117, and *Harrold v. Great Western R. W. Co.*, 14 L. T. N. S. 440. It is more like *Foy v. London, Brighton, and South Coast R. W. Co.*, 18 C. B. N. S. 225.

There must be a new trial; costs of last trial and of this motion to be costs to plaintiff in any event of the cause.

ARMOUR, C. J. :—

I agree that there must be a new trial.

In *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64, after issue joined, a release under seal of the action was obtained from the plaintiff, and was set up as a bar to the further maintenance of the action, and to it was replied that it was obtained by undue influence, and this being, as I thought at the time, an equitable issue, I tried the other issues with a jury, and this issue I tried myself. See Con. Rules 677, 678.

Moreover, the issue raised in that case was a distinct issue, while the issue, if any, raised by the document put in evidence in this case was not a distinct issue, but was rather a matter of evidence upon the issues of negligence and contributory negligence.

It would not have supported a plea of accord and satisfaction, for the money therein mentioned was not paid in

satisfaction of the causes of action, nor would it have Judgment.
supported a plea of release. It was contended that it Armour, C.J.
operated by way of estoppel, but the only estoppel it could
have operated as would have been estopping the plaintiff
from alleging that there was negligence on the part of the
defendants and no contributory negligence on his part.

It was submitted to the jury, however, as evidence on
those issues, and, standing by itself, without the evidence
of the circumstances under which it was given, furnished
cogent evidence of the absence of negligence on the part
of the defendants, and of contributory negligence on the
part of the plaintiff.

The jury, however, found negligence on the part of the
defendants, and no contributory negligence on the part of
the plaintiff, and I think that there was evidence of negli-
gence on the part of the defendants which the learned
Judge was bound to submit to the jury, and that he could
not have withdrawn the case from the jury on the ground
that there was contributory negligence on the part of the
plaintiff.

E. B. B.

[CHANCERY DIVISION.]

OLIVER V. LOCKIE.

Waters and Watercourses—Easement—Artificial Stream—Dominant Tenement—Servient Tenement—R. S. O. ch. 111, sec. 35.

The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement: and the fact that the burthen has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement.

The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O. ch. 111, sec. 35.

Ennor v. Barwell, 2 Giff. 410, distinguished.

Statement.

THIS was an action brought by Robert Oliver against Jane Lockie to restrain her from conducting water from a spring on her own farm through a pipe to her house, on the ground that the plaintiff, who owned the adjoining farm, was entitled to the use of the water under the circumstances set out in the statement of facts as found by the trial Judge.

The action was tried at Berlin on October 23rd and 24th, 1894, before STREET, J., without a jury.

A. Monro Grier, for the plaintiff.

DuVernet and Millican, for the defendant.

At the conclusion of the evidence the Judge found the following facts and reserved judgment with leave to counsel for both parties to hand in authorities.

STREET, J. :—

The facts as they appear to me upon the evidence are these: The spring in question rises on the farm of the defendant. The natural course of the water from the spring is down a hill into a field belonging to her and

thence across the line fence between the Lockie farm and the Oliver farm into some property marked "Bush land," now belonging to the plaintiff.

Judgment.

Street, J.

But between forty and fifty years ago, Mr. Lockie, who then owned the Lockie farm, had a ditch dug from about the foot of the hill in the direction marked on the plan "Old channel"; until after it crossed the line, the ditch was continued, or the water made a ditch for itself, possibly, and it finally disappeared in the bush land.

The bush land was used as pasture by the owner of the Oliver farm, which was also at that time occupied, and the cattle belonging to the owners of the farm were in the habit of drinking the water which came on to the Oliver land. That ditch was made at the time I have stated, for the convenience of the Lockie farm, in order to turn the water away from the cleared land at the foot of the hill; and the ditch, so far as it went through Mr. Lockie's place, was kept in repair by him.

Then, some eight years ago, the Lockie people and Mr. Oliver agreed to put an end to the old channel and to make the water run in a new channel. Mr. Oliver at that time was clearing up, or wished to clear up, the bush land, or had cleared it up; and he wished to divert the water from it in order that it might be cultivated. So a new channel was made, which is marked "New open creek" on the plan, and that has continued, subject to what I may say later on, down to the present time.

About fourteen hundred imperial gallons of water per hour rise at the spring. That is about the ordinary quantity of water. In wet seasons and wet periods of the year the water does not all run down the new channel. Part of it at times runs over and finds its way down past the old channel and into the field of the defendant. To a certain extent after heavy rains several times a year, not exceeding five according to the evidence, the water breaks through the embankment at the turn at the foot of the hill into the present drain and runs into the cleared land belonging to Mrs. Lockie at the foot of the hill, until some person repairs the bank of the drain.

Judgment

Street, J.

That repairing has been done by Mr. Oliver, who has been, since the new channel was opened, in the habit of going on to the Lockie farm for the purpose of making the necessary repairs. If he or some person did not make these repairs, no water would run along the new open creek ; it would all run, first of all, on Mrs. Lockie's farm and then from Mrs. Lockie's farm on to the bush land.

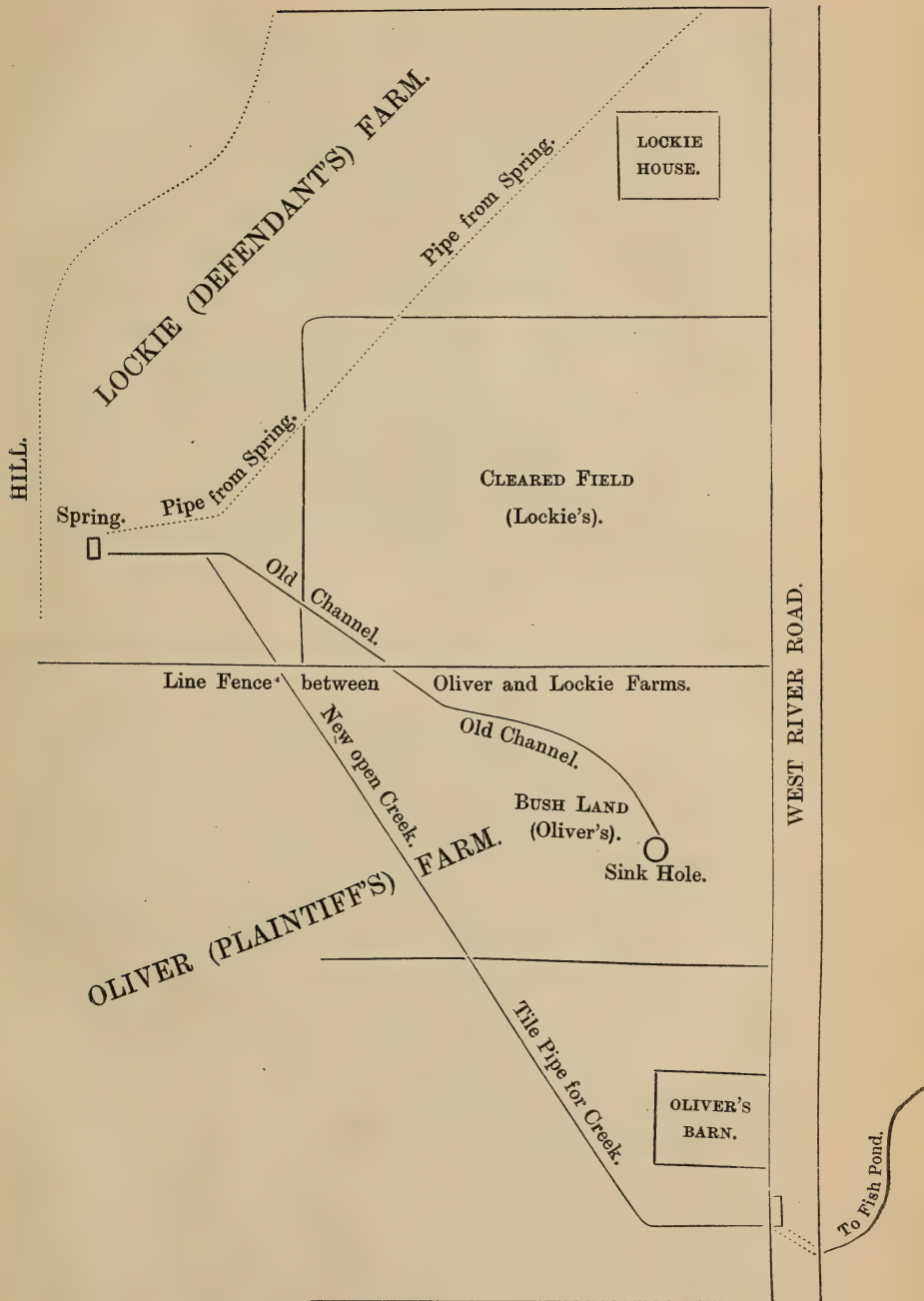
The defendant some time before the commencement of this action, got the idea she would supply her house with water from this spring. She never had any intention, I think, so far as I can make out, of taking more than enough water from the spring for the supply of the house ; that being, as she says, two hundred gallons an hour. That seems a very large allowance for a house.

She laid down a pipe, two and a quarter inches in diameter, from near the house to the spring, put a box in the spring and connected the pipe with the box. She did not intend to carry away more than the two hundred gallons an hour, and, for the purpose of taking that, she put a half-inch pipe into her house in connection with the two and a quarter pipe.

Without any previous consultation with her, or request to her, or personal correspondence with her about it, the plaintiff brought this action and got an interim injunction.

There was a tap on the half-inch pipe, and, since the injunction, a plug with a half-inch hole through it has been put into the two and a quarter inch pipe at the box, so that no more can run through that than two hundred gallons an hour, according to the calculation. It is not shewn whether more than two hundred gallons an hour could have found its way into Mrs. Lockie's house through the half-inch pipe.

After the injunction was granted, pending this action, a rain storm took place, which washed away the embankment at the angle at the foot of the hill and for a week or ten days no water at all ran in the open creek ; it all ran on to Mrs. Lockie's land. Then the defendant repaired it, and since then the greater part of the water has been run-



Judgment. ning down the open creek ; but for the last three weeks or
Street, J. so all of it has not been running down the open creek ; a
certain amount of it has been running over the side of the
open creek and finding its way down to Mrs. Lockie's farm.

The parties having agreed to an alteration of the channel in which the water ran, to cancel the old channel in fact and to make a new one, whether, when it is found afterwards that the old channel will not contain the water, but that the water may naturally flow out and flow on to the plaintiff's land, the plaintiff can insist any longer on any prescriptive rights he may have obtained from the flow of the water through the old channel, and whether he has any right at all to go on the defendant's land and build a new bank whenever the forces of nature break down the old one and let the water escape : that is one of the points ; and the other is as to whether the user asked is reasonable.

The following arguments and authorities were subsequently handed in :

A. Monro Grier, for the plaintiff. The new channel is a continuance of the old channel, and the old channel is a continuance of the original flow of the water to which the plaintiff was entitled. Under the circumstances in this case the fact that the channel was in some sense artificial, does not differentiate the case from a case where the channel is a natural one. The defendant's user is unreasonable and destructive of the plaintiff's rights: *Ennor v. Barwell*, 2 Giff. 410, at p. 422 to 427; *Hall v. Swift*, 6 Scott's Rep. 167; *Wood v. Waud*, 3 Exch. 748; *Briscoe v. Drought*, 11 Ir., C. L. R. 250; *Beeston v. Weate*, 5 E. & B. 986; *Bealey v. Shaw*, 6 East. 208; *The Directors, etc., of the Swindon Water Works Co. v. The Proprietors of the Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697; *Hale v. Oldroyd*, 14 M. & W. 789; Higgins on Pollution and Obstruction of Watercourses, 75, 90-92, 101, 104, 105.

Du Vernet, for the defendant. Every landed proprietor

is entitled to the reasonable user of water on his land Argument.
 without reference to the effect on his neighbour : Addison
 on Torts, 6th ed., 278 ; Kerr on Injunctions, 3rd ed., 240 ;
 Angell on Watercourses, 7th ed., 217 ; *Dickson v. Carnegie*,
 1 O. R. 110 ; *Earl of Sandwich v. Great Northern R. W.*
Co., 10 Ch. D. 707 ; *Arthur v. Grand Trunk R. W. Co.*, 25
 O. R. 37 ; *Ellis v. Clemens*, 21 O. R. 227. The plaintiff has no
 prescriptive right to have the water through the new chan-
 nel : *Malcolm v. Hunter*, 6 O. R. 102 ; *Gaved v. Martyn*,
 19 C. B. N. S. 732 ; *Arkwright v. Gell*, 5 M. & W. 203 ;
Greatrex v. Hayward, 8 Exch. 291 ; *The Stockport Water*
Works Co. v. Potter, 3 H. & C. 300 ; *Taylor v. Hampton*,
 4 McCord (S. Car.) 96. An alteration of the easement by
 the dominant tenement to the prejudice of the servient
 tenement will destroy the easement : *Goddard on Ease-*
ments, 2nd ed., 360. The easement cannot be increased or
 extended : *Hale v. Oldroyd*, 14 M. & W. 789.

November 19, 1894. STREET, J. :—

In addition to the facts found at the trial, it appeared
 that there were springs upon the plaintiff's property which
 furnished an abundant supply of water for the purposes of
 watering cattle and the other needs of the place as a farm.

The water which came from the spring on the defen-
 dant's property did not, until the digging of the ditch in
 1842, spoken of by the witness, Andrew Orr, run in any
 channel at all, but flowed down the hill and spread over
 the plaintiff's cultivated field below the hill and from
 thence across the boundary line upon the defendant's wood-
 land adjoining.

The predecessor in title of the defendant then, for his
 own convenience and in order to prevent the water from
 turning his cleared land any longer into a swamp, dug the
 ditch marked "Old channel" upon the plan, near the foot
 of the hill and turned the water upon the plaintiff's land,
 which, being bush land, was not injured by it, and then it
 gradually soaked away into the soil.

Judgment.

Street, J.

This state of things continued from 1842 until about the year 1886, when, for the plaintiff's convenience, a new ditch was dug higher up the hill and the water was turned away from the plaintiff's bush land which he wished to cultivate and was carried at a higher level through his farm and across the road to an artificial fish pond.

Upon the facts of the case, which are, I think, hardly disputed in any material particular, I am of opinion that the plaintiff has not made out any prescriptive right to the enjoyment of the stream of water into which this spring has been converted.

The rule seems to be that where an owner, for his own convenience, creates an artificial watercourse for the purpose of discharging surplus water upon his neighbour's land, he obtains at the expiration of the statutory period a right to continue to discharge it, but the neighbour acquires no right to insist upon the continuance of the flow. The reason for this is that the easement arises for the benefit of the land from which the water is discharged, and continues to exist because of the continuance of the benefit of that land and for that purpose alone. It is no concern of the owner of the dominant tenement what use is made of the water by the owner of the servient tenement after it is discharged upon him; he has no right to interfere with any use to which the owner of the servient tenement may choose to put it and no means of doing so except by terminating his own easement.

But the owner of the servient tenement, taking the water by an artificial and not a natural stream, takes it with notice that the stream is created for the convenience of the dominant tenement and that it may be diverted when his purpose has been served. There is, therefore, from the beginning not only an absence of that enjoyment of the water as of right necessary to entitle the owner of the servient tenement to a reciprocal easement, but a submission from the beginning to a burthen imposed by the dominant owner. Under such circumstances, the fact that the burthen has continued to be imposed for a period of

over forty years cannot alter the character of the easement and convert the dominant into a servient tenement.

Judgment.

Street, J.

Under the Statute, R. S. O. ch. 111, sec. 35, the enjoyment, whether for twenty years or for forty years, must be by a "person claiming right thereto."

Here there is, as I have said, no evidence of any claim to a right to the enjoyment of the water cast upon the plaintiff's land and but the most casual evidence of the only enjoyment alleged, viz., that the cattle on the plaintiff's property drank the water: *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *Arkwright v. Gell*, 5 M. & W. 203; *Gaved v. Martyn*, 19 C. B. N. S. 732; *Beeston v. Weate*, 5 E. & B. 986; *Mason v. The Shrewsbury, etc., R. W. Co.*, L. R. 6 Q. B. 578; *Sampson v. Hoddinot*, 1 C. B. N. S., at p. 611.

I do not think that the facts here are sufficient to bring the case within the law as laid down in *Ennor v. Barwell*, 2 Giff. 410, even if that case does not somewhat strain the law. It is contended upon the authority of that case that the plaintiff, independently altogether of the enjoyment by means of the artificial drain, is a riparian proprietor by reason of the fact that the waters from this spring, after spreading over the ground of the defendant at the foot of the hill, found their way originally upon the plaintiff's land, although in no defined channel, and that the defendant could not divert them. But it is now established that a defined channel is an essential part of a stream and here there is none.

It is further established in this case that for upwards of forty years the defendant has diverted the natural flow from her own cultivated land and cast the water by an artificial channel or ditch upon the plaintiff's land at another point higher up, so that any riparian rights which the plaintiff might have claimed from the natural flow have been long taken away by prescription.

I am of opinion, therefore, that the plaintiff has shewn no right against the defendant and that the action must be dismissed with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

CULLERTON V. MILLER.

Water and Watercourses—Navigable Waters—Ice—Right of Free Passage Over—Action for Declaration of Right—Damages—Loss of Business.

The defendant, the owner of certain water lots upon a lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do :—

Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen ; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the Court for a declaration of right.

Gooderham v. City of Toronto, 21 O. R. 120, 19 A. R. 64, and *City of Toronto v. Lorsch*, 24 O. R. 229, followed :—

Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal ; but, as he had acted without malice and under a *bond fide* mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice.

Statement.

THIS was an action brought by Edwin A. Cullerton, a dealer in ice, against Levi Miller, a lumber merchant, for an injunction and damages in respect of the matters set out in the pleadings and the judgments.

The statement of claim alleged :—

2. That the plaintiff on or about the 2nd day of March, 1894, went to Jackson's Point, on Lake Simcoe, to cut and ship ice for use in his business and to fulfil contracts entered into by him.

3. The plaintiff proceeded to cut ice, but the defendant refused to allow him to draw, haul, or float it through or over certain water lots which the defendant owned, under and by virtue of a patent from the Crown, to the dock or wharf of the Grand Trunk Railway Company, unless the plaintiff would pay the defendant eight cents per load by way of toll for the privilege of carrying the ice over the defendant's water lots, which the plaintiff refused to do.

4. By the patent referred to the public rights and Statement
privileges were expressly reserved in the words following:—"To have and to hold the said parcel or tract of land hereby granted * * unto the" (defendant) " * * saving, excepting, and reserving, nevertheless, unto us, our heirs and successors, the free user, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

5. It was also provided by the patent that the grant made was upon the express understanding that whenever the Lake Simcoe Junction Railway Company should have completed their railway to Jackson's Point, and should actually require for a dock, or otherwise for railway purposes, the water lots portion of the water lots thereby granted, the defendant, his heirs or assigns, should sell to that company the secondly mentioned water lots described in the patent.

6. In pursuance of this proviso, the land mentioned was conveyed to the Lake Simcoe Junction Railway Company for the purposes described, and a dock was erected on and over the water lots for railway and other purposes.

7. The Grand Trunk Railway Company were now the owners of the plant, stock, and property of the Lake Simcoe Junction Railway Company, and also the wharf or dock mentioned.

8. The plaintiff had permission from the Grand Trunk Railway Company to use this wharf or dock for the purpose of loading and shipping ice cut by him in Lake Simcoe.

9. The defendant's water lots extended some distance out into Lake Simcoe, in front of the wharf referred to, and around it, so that in order to reach it from Lake Simcoe, it was necessary to pass over such water lots.

10. The water in and around the wharf and over the defendant's water lots was from ten to fourteen feet deep, and was navigable water, and so were the waters of Lake Simcoe.

Statement.

11. The waters of Lake Simcoe, including those upon the defendant's lots, were frozen until about the 8th March, 1894.

12. The plaintiff had entered into three large contracts to supply ice, and, besides, required a large quantity of ice to supply his customers.

13. The plaintiff would have been able to cut and ship sufficient ice to fill his contracts and for use in his business, had the defendant allowed him so to do without charging the toll referred to.

14. The plaintiff, by reason of the action of the defendant, was unable to fill his contracts or to meet the demands of his customers, and had suffered very great damage thereby.

The plaintiff, therefore, claimed an injunction restraining the defendant from interfering with his free use of or passage over and upon the water over the defendant's water lots for the purpose of carrying ice, etc., and \$3,500 damages.

The defendant demurred to the statement of claim upon the grounds that it disclosed no personal right in the plaintiff, and shewed no right of action whatever; if it intended to set up a public way over the water lots of the defendant, the plaintiff was not a person who, upon the facts alleged, could maintain an action for the assertion of such public right.

The defendant also delivered a statement of defence, alleging:—

2. That the defendant was the owner of the water lots in question.

3. That on the 2nd March, 1894, he was the owner of the ice upon such water lots.

4. That the plaintiff made no attempt to cut ice at Jackson's Point on Lake Simcoe on the 2nd March, 1894, or before or after that date.

5. That no ice could have been taken for commercial purposes from the neighbourhood of Jackson's Point on Lake Simcoe on or since the 2nd March, 1894.

6. That if the plaintiff had cut ice on Lake Simcoe, he could have hauled it to the railway without crossing the ice on the defendant's water lots. Statement.

7. That there was no navigation on Lake Simcoe from about the 25th December to the 1st May in each year.

The action was tried at Toronto, before ROSE, J., without a jury, on the 5th October, 1894.

L. V. McBrady, for the plaintiff.

William Macdonald, for the defendant.

At the conclusion of the evidence and argument judgment was delivered as follows :—

October 5, 1894. ROSE, J.:—

First, as to the right of action. I have considered this question in the light of *City of Toronto v. Lorsch*, 24 O. R. 229, and also *Gooderham v. City of Toronto*, 21 O. R. 120, reported in appeal in 19 A. R. 64, where the right of a private person to have a declaration as to whether certain land was or was not a public highway as against the municipal corporation was affirmed. I considered the right of a party to bring an action for damages resulting from interference with right of navigation in *McNabb v. Parkyn*,* tried before me at Lindsay, in which I gave judgment on the 30th April, 1892, where the complaint was that access to the shore from the water and to the water from the shore was interfered with, and, although in that case I found against the plaintiff, it was because I found no damage shewn that affected him personally.

In considering that question I found a very neat statement of the law in Gould on Waters, 2nd ed., p. 247, where in a foot note are these words: "In other words, the distinction is between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in the highway."

* Not reported.

Judgment. I think here there is a cause of complaint, namely, an
Rose, J. interference by the defendant with the plaintiff's right of access to a highway. I also think the plaintiff has a right of action, because I think he has shewn *prima facie* a personal loss as distinguished from a public loss; it is damage to himself, apart from any injury to the public. In the third place, I think he has a right to come to the Court for a declaration of right as in *City of Toronto v. Lorsch*.

The status of the plaintiff is, therefore, I think, established. If there be any doubt about that, and counsel for the plaintiff desire and obtain the consent of the Grand Trunk Railway Company, which owns the wharf, I give leave upon the filing of such consent to add the Grand Trunk Railway Company as a plaintiff, without imposing any terms as to costs, because I am with the plaintiff on the three grounds I have stated.

That brings me to the main question, whether the plaintiff has a cause of action for being interfered with in taking ice from the water beyond the defendant's water lot, and carrying it across the defendant's water lot to reach the wharf of the Grand Trunk Railway Company. I stated during the argument the views that occurred to me, and anything I may say will be nothing more than a summation of the various suggestions there made, but for the purpose of particularity I will put the proposition as I understand it. Beyond question, I think that if the water covering the defendant's water lot were not covered with ice, the plaintiff might well load vessels with ice from the lake beyond the defendant's water lot and carry it in boats across the water lot in the ordinary course of navigation, if it was necessary for the purposes of his business so to reach the railway wharf. The water is a highway for the purpose of reaching the wharf, and I see no distinction in principle between the water being in a fluid condition and being congealed. I think the plaintiff has the same right to traverse the water lot for the purpose of reaching the wharf whether the water be fluid or frozen

into ice. I think the word "water" must be read, having regard to the climate and the necessities of the case, and the convenience of trade, as covering both water in a fluid and water in its congealed state, because a contrary conclusion would go the length of preventing the company, which has the wharf, from going out into the lake and gathering ice and bringing it to its wharf. In other words, the defendant could not interpose his right to the use of this water lot so as to prevent the enjoyment by the company of its wharf for the purpose of its business of carrying ice from the lake to the city.

Judgment.

Rose, J.

The defendant must have full and free use of his lot for the purposes for which it may be used, but so as not to interfere with the rights of others, and if there is a conflict between different rights, then, as in the case of *Woodman v. Pitman*, 79 Me. 456, cited in Am. and Eng. Encyc. of Law, vol. 9, p. 861, there must be such a determination of the conflicting rights as to give to each as far as possible the full enjoyment of his rights without the destruction of the rights of others.

In a word, I think the water over the defendant's lot is a highway, which the plaintiff may traverse, may go upon and cross in any vehicle necessary for the purpose of using such highway, and that such use of the highway is within the meaning of the words or term, "navigation of the waters." I do not see why navigation for the purposes for which the highway is used should be confined to the summer months to the exclusion of the carrying on of trade and commerce in any form, or to the destruction of any business rights. I say, therefore, that the plaintiff has a right of action and may maintain it for the causes alleged, and I think the plaintiff, from what appears before me here, has a cause of action as licensee of the wharf of the company, which desires to do business by means of the plaintiff and others in its carrying trade. The question as to damages may be entered upon presently, if the parties cannot agree.

Judgment. Subsequently on the question of damages the learned
Rose, J. Judge delivered the following judgment:

October 15, 1894. ROSE, J.:—

At the hearing I found that the defendant had no right to refuse the plaintiff permission to cross the defendant's water lot upon the ice in order to convey to the wharf of the Grand Trunk Railway Company, ice cut in the lake beyond the defendant's water lot, and had no right to demand from the plaintiff two and a-half cents per ton as toll for passing upon the ice over the water lot. It follows that the defendant is liable for such reasonable damages as flow directly from the wrong thus done.

The defendant, I find, acted, not maliciously, but in accordance with a supposed right. I find as a fact that he believed that no one had the right to cross his water lot upon the ice without his consent. This right had been admitted by two parties or companies cutting ice outside of his water lot, and who, as was stated at the trial, had paid him toll for the privilege of crossing. The plaintiff knew that this right had been thus practically admitted by the parties cutting ice, and he himself was about to cut ice, using the plant belonging to one of the companies thus paying toll. When, therefore, the defendant demanded toll from him, he knew, or should have known, that such demand was not vexatiously made, but was made for the purpose of asserting a right which the defendant believed existed for his benefit.

The plaintiff might, upon the payment of two and a-half cents a ton, have obtained the ice which he sought. Such payment might have been made under protest, and the amount thus paid have been recovered back. He chose, however, to refuse to pay such toll, and told the defendant that if he prevented him from obtaining ice he would hold him responsible for all damage which would arise from destruction of his business. The defendant not yielding to his demand to cross the ice without payment of toll,

the plaintiff came back to Toronto and instituted proceedings to obtain an injunction and for damages. But for the interference of the defendant the plaintiff might have commenced cutting on Tuesday morning the 6th day of February. The conversation between the plaintiff and the defendant in which toll was demanded was on the Friday previous. The plaintiff obtained an injunction on the afternoon of Wednesday following. He might, therefore, have gone to work on Thursday morning, and, if his evidence is to be credited, might have obtained, say, 1,200 tons of ice fit for the market during the following days of Thursday, Friday, and Saturday. He delayed, however, for reasons which he gave, until the following Monday, when he was advised that the ice had become so rotten by reason of the warm weather that it was not fit for the market, and in fact it was impracticable to cut it.

He now claims as damages the loss to his business arising from not being able to stock his store-house with, say, 1,500 tons of such ice as he could obtain only from Lake Simcoe or the Grenadier Pond. I say 1,500 tons, as in examination the plaintiff said that he intended to store about half the space with ice fit for domestic purposes.

I have very great doubts as to the condition and quality of the ice from Monday the 5th day of February, and have difficulty in making up my mind upon the evidence that the plaintiff could have begun work on Tuesday and obtained the supply which he required. The evidence is not satisfactory. It is certain that Mr. Burns, who was taking out ice and using plant the plaintiff was to use, ceased cutting on Friday the 2nd, and after that took out no ice. One of the men who had been working for Mr. Burns stated that Mr. Burns was very particular as to the quality of the ice which went into his store-house, and would not allow them to put any in that was not perfectly clear and solid. Even if the plaintiff could have obtained ice on Tuesday and Wednesday, the two days during which he was delayed by reason of the defendant's action, it is not probable that he could have cut and removed more than

Judgment.

Rose, J.

Judgment. from 600 to 800 tons in the two days. But if he could
Rose, J. have obtained 1,200 tons during the remaining days of
the work, his loss through the defendant was only 300 tons
at the outside.

But what should be the true measure of damages in this case? What should I, assessing damages as a jury might assess them, award the plaintiff? I have not been referred by counsel to any case similar to the one before me, and, after such search as I have been able to make, I have been unable to discover any. But I think the principles which are found collected in the text books are such as would make it unreasonable for me to award the plaintiff damages for the loss of the business which he says he lost in consequence of the defendant's action. I find in Sedgwick on Damages, 7th ed., in a note to p. 56, the principle laid down as follows: "In cases where it is the plaintiff's duty to diminish the loss, it may be shewn not only what he actually did to so diminish it, but what he might have done. So an employer, sued for discharging a servant, can shew what the servant might have earned. *Sutherland v. Myer*, 67 Me. 64. So a defendant can reduce the plaintiff's consequential damages by shewing an offer by him which, if accepted, would have prevented any further injury. See *Parsons v. Suttons*, 66 N.Y. 92. So where a defendant can shew an offer of other premises in lieu of premises he failed to deliver possession of. *Dobbins v. Duquid*, 65 Ill. 464. So where the defendant had broken a contract to make over to the plaintiff all orders for machines, he was allowed to shew a subsequent offer to do so, as the plaintiff was bound to use ordinary efforts to make the damages as slight as possible. *Beymer v. McBride*, 37 Ia. 114." Again at p. 164 it is said: "The same principle which refuses to take into consideration any but the direct consequences of the illegal act, is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them. 'If,' said Lord Chief Justice Abbott, at *Nisi Prius*, 'you charge anybody with a loss arising from mistake, you should shew that no due

diligence could have been used by you which might have prevented that loss.'” And at p. 166, citing from *Miller v. Mariner’s Church*, 7 Greenl. 51, is found the following quotation: “Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed ; and if the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. If a party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions,—he fails in social duty if he omits to do so.” And on p. 168: “So, generally, it has been said that a plaintiff cannot recover for damages which could have been avoided by the payment of money. *Hayden v. Cabot*, 17 Mass. 169.”

Judgment.
Rose, J.

In Sutherland on Damages, 2nd ed., vol. 1, sec. 90, it is said: “The principle that the injured party must reasonably exert himself to prevent damage applies alike to cases of contract and tort.” And sec. 88: “The law imposes upon a party injured by another’s breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him.”

The principle applying to cases of master and servant seems to me to be applicable to this case. It is, of course, well known law that a servant when wrongfully discharged may not lie idle after the breach, if by the use of ordinary diligence he might secure employment elsewhere during the remainder of the term, it being incumbent upon him to do whatever he reasonably can and to improve all reasonable and proper opportunities to lessen the injury, and that whatever sum he actually earned, or might have earned by the use of reasonable diligence, ought to be deducted from the amount of the unpaid stipulated wages. It is also a well recognized principle that where the wrongdoer has acted

Judgment.

Rose, J.

without malice and has taken his erroneous position by mistake, but in good faith, in the exercise of a supposed right, no punitive damages should be given, but that the damages should be confined to those which are the direct consequence of his conduct.

In the present case it seems to me that the conduct of the plaintiff in refusing to pay the small sum demanded for toll, which upon the whole quantity of ice that he could have taken out during the time at his disposal would not have amounted to more than \$30 or \$40, and electing to run the risk of not obtaining ice for the season, thus destroying his business, and with the purpose of charging the defendant with such loss, was most unreasonable. As I have stated, he had no reason to suppose that the conduct of the defendant was malicious, and he knew that the other parties were paying the toll demanded.

Having regard, therefore, to these facts and also to the doubt that I have as to the quality of the ice during the two days of delay, namely, Tuesday and Wednesday, consequent upon the defendant's action and prior to the injunction, I do not think that I should assess the damages at more than \$20.

I should have arrived at the same conclusion apart from the doubt as to the quality of the ice, but that forms an added reason.

I think the case is one which, having regard to the issues involved, was properly brought in the High Court, and that the plaintiff should have his full costs on the High Court scale. As the season has passed for gathering ice, there will be no necessity for an injunction, unless the defendant should again assert the right which has been decided against him, in which case a motion can be made in this suit if necessity should arise.

E. B. B.

[QUEEN'S BENCH DIVISION.]

RE CLARK ET AL. V. BARBER.

*Prohibition—Division Court—Money Payable by Instalments with Interest
—Dividing Cause of Action—R. S. O. ch. 51, sec. 77.*

Under an agreement for sale of land, the balance of the purchase money was payable by instalments with interest at a named rate half-yearly ; and at a time when three of the instalments of principal, and interest amounting to \$70, and three years' taxes, were overdue, an action was commenced in a Division Court for the arrears of interest and two years taxes, \$95.30 :—

Held, reversing the decision of BOYD, C., 25 O. R. 253, who had refused prohibition, that the plaintiffs could have recovered all the purchase money and interest due when the action was begun under one count in a Superior Court ; and therefore there was a dividing of their cause of action within the meaning of sec. 77 of the Division Courts Act, R. S. O. ch. 51.

Re Gordon v. O'Brien, 11 P. R. 287, approved and followed.

Public School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310, distinguished.

AN appeal by the defendant from the order and decision of BOYD, C., 25 O. R. 253, dismissing the defendant's motion to prohibit further proceedings in a plaint in the 10th Division Court in the county of York. Statement.

Under an agreement for the sale of land dated 7th September, 1889, the balance of the purchase money was made payable by instalments with interest at seven per cent. half-yearly, and three of the instalments, amounting to \$240, as well as the interest, amounting to \$70, and three years' taxes, were overdue. An action was commenced in the 10th Division Court in the county of York for the arrears of interest and two years' taxes, amounting to \$95.30.

The appeal was taken on the following grounds :—

(1) That the Division Court had no jurisdiction, inasmuch as the title to an hereditament came in question in the plaint, and the cause of action did not come within sec. 70 of the Division Courts Act, R. S. O. ch. 51. (2) That the Division Court plaint was a dividing of a cause of action in violation of sec. 77 of the Act.

Argument. The appeal was argued before the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE, J.), on the 19th November, 1894.

R. B. Beaumont, for the defendant. The Division Court action is an indirect means of obtaining specific performance, which is the plaintiffs' only remedy, except damages. Here the interest was part of the purchase money. If the action were brought in the High Court for specific performance, the defendant would have a good defence. It is unjust to him to allow this plaint to proceed. It is for the purchase money of land, and the Division Court cannot award the proper relief. It is also a dividing of a single cause of action: *In re Aykroyd*, 1 Ex. 479; *Wickham v. Lee*, 12 Q. B. 521; *Wood v. Perry*, 3 Ex. 443; *Re McKenzie and Ryan*, 6 P. R. 323.

R. M. Macdonald, for the plaintiffs. No case shews that a claim for interest is the same cause of action as one for principal. It is a different cause of action, and there is no splitting of demands: Heywood's Annual County Courts Practice, 1894, p. 55; *Dickenson v. Harrison*, 4 Pri. 282; *Popple v. Sylvester*, 22 Ch. D. 98; *Public School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A. R. 310. If prohibition is granted, there should be no costs, or costs should be set off, as in *Re Shepherd and Cooper*, 25 O. R. 274.

December 19, 1894. The judgment of the Court was delivered by

ARMOUR, C. J.:—

In *Wickham v. Lee*, 12 Q. B. 521, Erle, J., said: "It is not a splitting of actions to bring distinct plaints where, in a superior Court, there would have been two counts. I am not sure whether the Court of Exchequer (referring to *In re Aykroyd*, 1 Ex. 479), puts it so: but that is clearly the true construction of the Act."

Reading this statement in the light of the judgment of the Court of Exchequer in *Re Aylkroyd*, it seems to me to be a fair deduction from it that if the plaintiffs in this suit could have recovered all the purchase money and interest due and payable by the defendant to them under the said agreement at the time of the bringing of this action under one count in a Superior Court, there was a splitting of their cause of action within the meaning of sec. 77 of the Division Courts Act.

At the time this statement was made by Erle, J., the Rules of Hilary Term, 4 Will. IV., 1834, were in force, and under them it is clear that the plaintiffs could have so recovered under one count setting out the said agreement and alleging as many breaches of it as had then occurred: Wordsworth's Rules, 179-183.

This was the deduction my late brother O'Connor drew from the statement of Erle, J., and upon which he acted in the case of *Re Gordon v. O'Brien*, 11 P. R. 287, which the learned Chancellor declined to follow, following in preference the decision at *nisi prius* of Crampton, J., in *Wallace v. Whelan*, Circuit Reports in Ireland, 582.

Mr. Archbold, in his County Court Practice, 9th ed., p. 28, says: "The law on this subject may fairly be summed up by saying that if a person have several causes of action against the same party, in the same right, which he might join in the same plaint (or, in other words, which he might formerly have joined in the same count of a declaration in the superior courts), he must join them in the same plaint, if he will sue in a County Court, abandoning the excess of the aggregate amount if that amount exceed £50; but that he shall not be allowed to divide such causes of action, so as to have a separate plaint for each."

If the decision of my late brother O'Connor in *Re Gordon v. O'Brien* was not right, I fail to see under what circumstances there can be a splitting of causes of action where money is payable by instalments under a contract, for in *Re Aylkroyd* it was laid down that the cause of action

Judgment. referred to in the statute meant a cause of action which Armour, C.J. but for the enactment would be divisible.

If A. covenant to pay B. \$50 a month for six months, no doubt B. can sue A. for each sum of \$50 as it becomes payable, but if B. waits until all the payments become payable, he cannot then bring six suits in the Division Court for \$50 each, but must bring one suit for the whole \$300, and not, as is pointed out in *Re Aykroyd*, on the authority of *Girling v. Alders*, Vent. 73, "put the defendant to an unnecessary vexation."

The principle of *Girling v. Alders* has been followed in numerous cases in the Courts of the United States, which are to be found, for the most part, in the American and English Encyclopædia of Law, Title "Actions"—11, "Splitting of Actions," vol. 1, p. 184c. See also *Stark v. Starr*, 94 U. S. 477; *Casselberry v. Forquer*, 27 Ill. 170.

I do not think that the case of *Public School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A. R. 310, is at all opposed in principle to the decision of *Re Gordon v. O'Brien*, for it is quite manifest that the sums there claimed could only have been recovered, under the practice as it existed when *Wickham v. Lee* was decided, under a separate count for the sum to which the plaintiffs were entitled in each year.

In my opinion *Re Gordon v. O'Brien* was rightly decided, and the order for prohibition in this case should go, with costs against the plaintiffs.

E. B. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. CUNERTY.

Justice of the Peace—Summary Conviction—Sale of Intoxicating Liquors—Quantity—R. S. O. ch. 194, sec. 2, sub-sec. 3—Finding of Magistrate—Power to Review—Certiorari.

The defendant, the holder of a shop license under the Liquor License Act, R. S. O. ch. 194, was convicted by a magistrate for selling liquor in less quantity than three half-pints, contrary to sec. 2, sub-sec. 3. The evidence shewed a sale of a bottle of ale and a flask of brandy, each containing less than three half-pints, the two together containing more than three half-pints.

Upon appeal from an order refusing a *certiorari* :—

Held, that it was within the jurisdiction of the magistrate to determine as a matter of fact whether the defendant had sold liquor in less quantity than three half-pints, and if a *certiorari* were granted, the Court would have no power, upon a motion to quash the conviction, to review the magistrate's decision.

Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, followed.

ON 4th September, 1894, the defendant, Terence Cunerty, Statement. was convicted before the deputy police magistrate for the city of Toronto for that he, having a shop license, did on 8th August, 1894, unlawfully sell liquor in less quantity than three half-pints, and was fined \$20 and costs.

The evidence before the magistrate shewed a sale of a quart bottle of ale, and a flask of brandy containing less than three half-pints, the bottle and flask containing together more than three half-pints. The magistrate held that an offence against the Liquor License Act had been committed by such sale.

“ ‘Shop license’ shall mean a license for selling, bartering, or trafficking by retail in such liquors in shops, stores, or places other than inns, ale or beer-houses, or other houses of public entertainment, in quantities not less than three half-pints at any one time, to any one person, and at the time of sale to be wholly removed and taken away, in quantities not less than three half-pints at a time :” R. S. O. ch. 194, sec. 2, sub-sec. 4.

Statement. On the 24th September, 1894, the defendant moved before ROSE, J., sitting in Chambers, for a *certiorari* to remove the conviction and evidence into this Division, upon the ground that the evidence shewed a sale of more than three half-pints of intoxicating liquor, and therefore no offence against the Act was proved, and the conviction was irregular and illegal.

ROSE, J., gave judgment immediately after the argument of the motion, refusing to order the issue of a *certiorari*.

At the Michaelmas Sittings of the Divisional Court, 1894, the defendant moved by way of appeal from the order of ROSE, J., for an order for a *certiorari*, upon the same ground.

The motion was argued before ARMOUR, C. J., and STREET, J., on the 27th November, 1894.

Haverson, for the defendant. The magistrate found that the ale and brandy together amounted to more than three half-pints. The sale was to one person, and if the articles were not sold "at one time" literally and exactly, they were taken away at the same time. The fact that there were two different kinds of liquor does not make it a sale of less than three half-pints. The Act makes no such distinction. Nor does the fact that the liquors were contained in two different vessels, each containing less than three half-pints, make it such a sale. More than three half-pints were taken away at one time, and that is the gist of the matter. I refer to *Fairclough v. Roberts*, 24 Q. B. D. 350; *Regina v. Scott*, 34 U. C. R. 20; *Morris v. Tharle*, 24 O. R. 159.

J. R. Cartwright, Q. C., for the Crown. There were really two sales, each, or one of the two, of less than three half-pints. Looking at sub-secs. 2, 3, and 4 of sec. 2, that is the reasonable view.

December 19, 1894. The judgment of the Court was delivered by

STREET, J. :—

Judgment.

Street, J.

It was understood upon the argument that we were to consider this application as if it were a motion to quash the conviction, and to refuse it unless we were of opinion that the judgment appealed from is wrong, or that it could not be reversed.

We have come to the conclusion that if the conviction and proceedings were removed into this Court by *certiorari* and a motion thereupon made to quash the conviction, the motion must be dismissed, for the reason that we have no power upon such a motion to review the decision of the police magistrate in a matter within his jurisdiction. It was plainly a matter within the jurisdiction of the police magistrate to determine upon the charge before him, as a simple matter of fact, whether the defendant had or had not sold liquor in less quantity than three half-pints, which as the holder of a shop license he was forbidden to do, and we cannot review his finding upon the point. There is no question raised as to the jurisdiction of the police magistrate to try the question. The law upon the subject has been stated in many cases. In *The Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417, at p. 443, Sir James Colville thus puts it: "But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide." See also the cases cited in *Regina v. Grainger*, 46 U. C. R. 382.

For this reason we think the motion must be dismissed, but we are not to be taken as assenting to the view of the deputy police magistrate upon the construction of the statute.

E. B. B.

[QUEEN'S BENCH DIVISION.]

SCHMIDT ET UX. V. TOWN OF BERLIN.

Negligence—Municipal Corporations—Public Park—Licensee—Knowledge.

A municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries sustained owing to want of repair of the building, at all events where knowledge of the want of repair is not shewn.

Statement.

THIS was an action for damages brought by a husband and wife against the municipal corporation of the town of Berlin for injuries sustained by the wife owing to the alleged negligence of the defendants, tried at Berlin in October, 1894, before STREET, J., with a jury.

The defendants were the owners of a park surrounded by a fence. In this park was a building, which had originally been used for concerts, but of late years only at agricultural shows held in the park, and as a dressing-room for athletes, and for occasional refreshments during football matches and bicycle races. People had also used it when rain came on during any gatherings in the park. The musical societies of Berlin and Waterloo had obtained leave from the defendants to have the exclusive use of the park and building upon the Queen's birthday, 1894, for the purpose of holding some games there, and they charged an admission fee. The plaintiffs attended the games and were present with a large number of other persons upon the ground. Rain came on in the afternoon, and the people went into the building, after some demur on the part of the caretaker of the grounds. The female plaintiff was sitting in the building during the rain, when a board forming part of the ceiling above her fell down and injured her, and this action was brought by her and her husband to recover damages for the injury sustained.

The following were the questions put to the jury with their answers :

1. Did the defendants give to the committee of the societies permission to use the park on the 24th of May last ? Yes.

2. Did the defendants give them permission to use the building in the park for the same day? Yes. Statement.

3. Was the permission so given a permission to have the exclusive use of the property so as to entitle the committee of the societies to charge an admission fee? Yes.

4. Was the building opened to the public at the request of the committee of the societies (or of some one on their behalf)? Yes.

5. Had the caretaker any authority from the defendants (or any one on their behalf) to open the building on the 24th of May last? Yes.

6. Was the accident due to any negligence of the defendants? Yes.

7. If so, in what did such negligence consist? By not keeping the building in proper repair.

8. If the plaintiffs are entitled to damages, at what sum do you assess them? To the husband, \$200; to the wife, \$200.

The plaintiffs moved for judgment upon these findings.

November 5, 1894. STREET, J. :—

Upon the findings of the jury there was no invitation, express or implied, on the part of the defendants to go into the building in which the accident took place; the invitation came from the committee of the musical societies who had on the day in question the exclusive possession of the park, and who received the money taken at the gate.

In their capacity of owners of the premises the liability of the defendants cannot be greater than that of a landlord who has let to a tenant premises from the condition of which damage arises to one of the customers or guests of the tenant. There, in the absence of a contract on the part of the landlord to put the premises in repair, knowledge on his part of the dangerous state of the premises appears to be a necessary condition to his liability for any damage sustained: *Hett v. Janzen*, 22 O. R. 414; *Robbins v. Jones*, 15 C. B. N. S. 221, 240; *Todd v. Flight*, 9 C. B. N. S. 377,

Judgment. 390; *Gautret v. Egerton*, L. R. 2 C. P. 371, 374; *Heaven v. Street, J. Pender*, 11 Q. B. D. 503.

I was not asked at the trial to leave to the jury any question as to the knowledge on the part of the defendants of the state of the building, probably because it was not considered that there was evidence to support a finding against the defendants on this point. I am of opinion that there was not sufficient evidence to have justified me in leaving such a question to the jury. It was, however, agreed expressly by counsel that any questions of fact not submitted to the jury which should afterwards be deemed necessary to be determined, should be determined by me, and if a finding is necessary, I find that the defendants had not notice or knowledge at or before the date of the accident that the building was in a dangerous condition.

I am of opinion, therefore, that judgment should be entered for the defendants with their costs of defence.

At the Michaelmas Sittings of the Divisional Court, 1894, the plaintiffs moved for an order setting aside this judgment, and for an order that judgment be entered for the plaintiffs with costs, or for a new trial, on the grounds:

1st. That the judgment was against law and evidence and the findings of the jury.

2nd. That upon the law and evidence and the findings of the jury judgment ought to have been entered for the plaintiffs.

3rd. That the defendants were liable to the female plaintiff as a stranger for misfeasance in letting the building in question, out of repair, to the musical societies who had the use of the building and grounds for the day.

4th. That the defendants had the means of knowing the defective state of the building in which the female plaintiff's injuries were received, and negligently omitted to avail themselves of the means of knowledge.

5th. The defendants had full notice and knowledge of the defective and dangerous condition of the said building.

December 4, 1894. The motion was argued before Argument.
ARMOUR, C. J., and FALCONBRIDGE, J.

King, Q. C., for the plaintiffs. Corporations as owners of lands are liable in the same way as individuals: *Beven on Negligence*, p. 195; *Jones on Negligence of Municipal Corporations*, secs. 156-9; *Wharton on Negligence*, 2nd ed., secs. 828, 831; *Webb v. Rennie*, 4 F. & F. 608; *Roberts v. Mitchell*, 21 A. R. 433. The defendants were bound to repair, and liable for nonrepair; it is not necessary to shew actual knowledge on their part of the state of the building; if they negligently omitted to avail themselves of their means of knowledge, they are liable: *Penhallow v. Mersey Docks and Harbour Trustees*, 30 L. J. Ex. 329; *Mersey Docks and Harbour Trustees v. Gibbs*, L. R. 1 H. L. 93. The fact that the defendants were not paid for the use of the park and building, does not affect the question of their liability: *Mersey Docks and Harbour Trustees v. Gibbs*, L. R. 1 H. L. 93; *Coe v. Wise*, L. R. 1 Q. B. 711; *Smith on Negligence*, Bl. ed., ch. 2, sec. 2, sub-sec. 1. The plaintiffs were impliedly invited by the defendants, through their licensees. The defendants had an interest, the celebration being for the benefit of the town: see *Campbell on Negligence*, 2nd ed., secs. 43, 44; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311; *Smith v. London and Saint Katharine Docks Co.*, L. R. 3 C. P. 326; *Miller v. Hancock*, 9 Times L. R. 512. The defendants are also liable to the female plaintiff for misfeasance in letting the building, out of repair, to the societies for the use of those taking part in the games, and for the spectators as a place of shelter: *Wharton on Negligence*, 2nd ed., sec. 817; *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. at p. 313; *Welsh v. Canterbury and Paragon*, 10 Times L. R. 478.

W. H. P. Clement, for the defendants. The defendants owed no duty; there was no actionable breach of duty on their part: *Ivay v. Hedges*, 9 Q. B. D. 80; *Collis v. Selden*, L. R. 3 C. P. 495; *Gautret v. Egerton*, L. R. 2 C. P. 371. I rely also on the reasons of the trial Judge.

Argument.

King, in reply, referred to sec. 479, sub-secs. 22 and 23, and sec. 504, sub-secs. 8 and 9, of the Consolidated Municipal Act.

December 19, 1894. FALCONBRIDGE, J. :—

“It has been held in New England, and to some extent elsewhere, that there is no liability” (on a municipal corporation) “for a failure to keep buildings used exclusively for public purposes in a reasonably safe condition for use. It is said that these buildings are held for public purposes only, and that the corporation acts in its governmental character in maintaining them:” Jones on Negligence of Municipal Corporations, sec. 157.

By sec. 479 of the Consolidated Municipal Act of 1892, the council of any municipality may pass by-laws sub-sec. (22) for entering upon, taking and using and acquiring real property for public parks, etc., without the consent of the owners, making due compensation therefor.

And sub-sec. (23) makes provisions where the land expropriated is in an adjoining municipality.

And by sec. 504, sub-sec. (8), by-laws may be passed by the council of a city or town for acquiring any estate in landed property within or without the city or town for an industrial farm or for a public park, etc.; (9) for the erection of buildings and fences thereon; and (10) for the management of the farm, park, etc.

Neither here nor in any of the numerous authorities cited by plaintiffs’ counsel do I find the imposition of any duty towards those plaintiffs upon these defendants.

The learned Judge, acting under the consent given at the trial, has expressly and properly found on the evidence that the defendants had not notice or knowledge at or before the date of the accident that the building was in a dangerous condition, an element in some of the cases where mere licensees were suing.

I agree with the learned trial Judge for the reasons stated by him.

The case of *Moore v. City of Toronto*, 23rd June, 1893, Judgment.
is in point.*

Falconbridge,
J.

The motion must be dismissed with costs.

ARMOUR, C. J. :—

I am of the opinion that the rights of the plaintiffs as against the defendants can not be put any higher than the rights of mere licensees, and that under the circumstances of this case the defendants, as owners of the park and building, owed no greater duty, if any, to the plaintiffs than a private individual under like circumstances would have owed to them, had he been the owner thereof.

The defendants were in no way bound to provide this park and building for the use of the public, nor to maintain it, and were not under the same liability in respect to them as they would be in respect of buildings which they are bound by law to erect and maintain for the use of the public.

The extent of the duty owed by the owner of real property to persons going upon the same as mere licensees of

* MOORE V. CITY OF TORONTO.

BOYD, C. :—(Decision of Chancery Divisional Court.)

The island park is municipal property to which the public, free of charge, resort for purposes of recreation and amusement. The evidence shews that in 1890 the city authorities caused some of the lagoons to be dredged and deepened for the purpose of obtaining soil to fill up the swampy places. This they had the right to do, and no complaint is made as to its being properly done.

The evidence is that people frequenting the park in 1891 and 1892 were accustomed to let their children wade and paddle in the ponds without remonstrance or objection on the part of the persons in charge. The accident which gave rise to this action happened last summer, 1892. The child of the plaintiff (four years old) was playing in the water at the edge of a lagoon which had been dredged, and getting out of his depth or losing his footing, the mother rushed to help, but apparently slipped into the hole ten or twelve feet out, and was drowned, while the child was rescued.

The principles which determine liability as for negligence are to be drawn from cases as to the permissive use of premises rather than those of invitation to use and come upon property of another. Of the former *Hounsell v. Smyth*, 7 C. B. N. S. 731, is a ruling authority which lays it down that the owners of open waste land who allow persons to go upon it

Judgment. such owner is pointed out by Beven in his work on Negligence, at p. 1102, after a review of all the cases, as being :
 Armour, C. J.

1. To caution those using the land against any known insecurity which is of a not readily discoverable character.

2. Not to alter the character of the land—(a) by placing on it dangerous obstructions ; (b) by affecting the condition of the property whereby the danger is increased without notice.

3. To use due diligence—i.e., not to be guilty of negligence—in any work that is being carried on upon the premises, and by default in which injury might arise to the licensee.

And it is clear that “ the extent of the duty ” so pointed out does not cover the case in hand so as to make the defendants liable for the want of repair of the building.

No statutory duty was imposed upon the defendants to keep the park or building in repair, and it may be that upon this ground no liability whatever was cast upon the defendants : *Municipality of Pictou v. Geldert*, [1893] A. C. 524 ; *Steele v. City of Boston*, 128 Mass. 583 ; *Moore v. City of Toronto*.*

E. B. B.

for recreation or business are not under legal obligation to fence or warn against dangerous excavations. The person who chooses to use the waste has no right to complain of the danger. He must take the permission with its concomitant conditions and, it may be, perils. Other cases which may be usefully consulted are *Bolch v. Smith*, 7 H. & N. 736 ; and *Corby v. Hill*, 4 C. B. N. S. 556 ; *Sullivan v. Waters*, 14 Ir. C. L. Rep. 468 ; and *Steele v. City of Boston*, 128 Mass. 583.

There is no evidence (even if that would make a difference) to shew that this lagoon was in a safe state for children and others prior to the excavation, and no evidence of any change in the condition of the particular pond during the time in which the plaintiff's family frequented the place as a summer resort. Such evidence might have presented one phase of the conditions mentioned at the end of *Bolch v. Smith* : that if a hole had been made and covered in such a way as to appear to be sufficient, when in fact it was insufficient, so as to form a “ trap,” query whether the owner would not be liable even as to licensees. But, as at present advised, I do not think a hole in the soil is to be likened to a deepening of water formed by dredging, for it is not to be supposed that persons might walk into one as into the other.

But upon the facts of the case it is not needful to pursue any further the niceties of this line of inquiry.

I think the judgment of nonsuit should be affirmed.

MEREDITH, J., concurred.

[QUEEN'S BENCH DIVISION.]

HOLLENDER ET AL. V. FFOULKES.

Foreign Judgment—Action on—Defence—False Affidavit—Fraud—Court of Appeal in England—Decision of—Authority—Practice—Reply—Demurrer—Rules 403, 1322.

To an action on a foreign judgment the defendants pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the Court the true nature of the transactions between them and the defendant :—

Held, a good defence.

Abouloff v. Oppenheimer, 10 Q. B. D. 295, and *Vadala v. Lawes*, 25 Q. B. D. 310, followed in preference to the decision of the Court of Appeal for Ontario in *Woodruff v. McLennan*, 14 A. R. 242, in accordance with the expression of opinion of the Judicial Committee of the Privy Council in *Trimble v. Hill*, 5 App. Cas. 342, that a colonial court should follow the decisions of the Court of Appeal in England.

To the above defence, the plaintiffs, after the coming into force of Rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum :—

Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence ; and to such a replication Rule 403 had no application.

THE plaintiffs by their statement of claim alleged : (1) *Statement.* that they on the 26th day of April, 1893, pursuant to an order of the Master the Honourable R. Butler, dated the 18th day of April, 1893, recovered a judgment against the defendant in the High Court of Justice, Queen's Bench Division, England, for the sum of £261 5s. for debt and £13 13s. 6d. for costs of suit ; (2) that the amount of said judgment in Canadian currency was \$1,387.98 ; (3) that the defendant had not paid the amount of the said judgment ; and the plaintiffs claimed the amount of the said judgment and interest thereon from the 26th day of April, 1893.

The defendant by his statement of defence alleged : (1) that this action was dismissed after action brought by virtue of the order for security for costs obtained by the defendant, and served on the 18th November, 1893, and

Statement. the default of the plaintiffs to give security or make special application to the Court or Judge to otherwise order within four weeks thereafter ; (2) that the plaintiffs were picture dealers in London, England, who, by consent of defendant, consigned to him in Canada as their agent a quantity of engravings with a view to his trying to sell them for the plaintiffs to net certain invoiced prices and commissions and freight ; (3) that defendant was unable to effect any sales, and wrote to the plaintiffs for instructions as to the disposal of the said engravings and the payment of freight and warehousing charges ; (4) that the plaintiffs then falsely and fraudulently claimed that the said engravings had been sold to the defendant at the invoiced prices, and brought an action therefor against the defendant in the High Court of Justice, Queen's Bench Division, England ; (5) that the order for judgment referred to in the statement of claim was obtained upon a false affidavit that the defendant had purchased the said engravings, and the plaintiffs by fraudulently concealing from the High Court of Justice, Queen's Bench Division, England, the true nature of the transactions between the plaintiffs and the defendant, obtained the judgment in the statement of claim mentioned.

The plaintiffs (1) joined issue with the defendant on the 1st paragraph of the statement of defence herein. (2) In reply to paragraphs 2, 3, 4, and 5 of the defendant's statement of defence, the plaintiffs said that the defendant was precluded by law from raising any question as to the validity of the judgment sued on herein, which questions might have been raised by way of appeal in the forum where such judgment was obtained.

The cause was tried before ROSE, J., at the Autumn Sittings at Hamilton, 1894.

The plaintiffs put in an exemplification of the judgment sued on, and rested their case on that evidence.

W. H. Bartram, for the defendant, contended that he was not called on to prove any facts ; that the statement

of defence raised a question of law, and that the reply was a demurrer, and he relied on *Vadala v. Lawes*, 25 Q. B. D. 310. Argument.

McBrayne, for the plaintiffs. The defence is not good in law, as it raises the question whether the defence that a foreign judgment was obtained upon a false statement of fact is a good defence to an action on the judgment in this Province.

ROSE, J., on the authority of *Woodruff v. McLennan*, 14 A. R. 242, gave judgment for the plaintiffs for the amount of their claim and costs, on the ground that the statement of defence shewed no answer to the statement of claim, and he gave leave to the plaintiffs to amend their replication by alleging that the statement of defence "shewed no ground, and was bad in law."

At the Michaelmas Sittings of the Divisional Court, 1894, the defendant moved to set aside the judgment for the plaintiffs and to enter it for him, on the ground that the replication to paragraphs 2, 3, 4, and 5 of the statement of defence was no answer to them in law; that they set forth a complete defence to the action, upon which the defendant was entitled to judgment; and also moved to set aside the amendment made by the plaintiffs raising an issue of fact on these paragraphs, on the ground that the same was not allowed by the Judge at the trial, and if it was so allowed, it was not equitable or just that it should be made.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 29th November and 7th December, 1894.

W. H. Bartram, for the defendants, relied on *Aboulloff v. Oppenheimer*, 10 Q. B. D. 295; *Vadala v. Lawes*, 25 Q. B. D. 310; and contended that they should be followed in preference to *Woodruff v. McLennan*, 14 A. R. 242. He cited also *Crozat v. Brogden*, [1894] 2 Q. B. 30.

Argument. *McBrayne*, for the plaintiffs. The cases cited do not apply here. There is no statement here except that the plaintiffs perjured themselves in an affidavit upon which they obtained the foreign judgment. I refer to *Boswell v. Coaks*, 6 R. June 31; *Bank of Australasia v. Nias*, 20 L. J. Q. B. 284; Piggott on Foreign Judgments, 2nd ed., pp. 37, 38, 108; Wheaton's International Law, 3rd Eng. ed., p. 225. The pleading of the defendant is defective, as the particulars of the alleged fraud are not given. I rely also on *Woodruff v. McLennan*, 14 A. R. 242, which could not be more in point.

December 19, 1894. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The record produced before us shewed an amendment purporting to have been made two days after the trial, and "pursuant to leave of his lordship Mr. Justice Rose upon the trial," by which the joinder of issue was changed from being a joinder of issue upon the first paragraph of the statement of defence only, to a joinder of issue upon the whole statement of defence.

No leave was given by the learned Judge for any such amendment, but only for an amendment of the replication, "stating that the statement of defence shews no ground and is bad law," and no amendment of the replication has been made as suggested by the learned Judge.

The amendment made must, therefore, be struck out.

No demurrer is now allowed, but any party shall be entitled to raise by his pleading any point of law, and any point of law so raised shall be disposed of by the Judge who tries the cause at or after the trial: Con. Rule 1322.

The point of law raised by the replication was that paragraphs 2, 3, 4, and 5 of the statement of defence were no defence to the action.

This replication was equivalent to a demurrer to the like Judgment. effect under the former practice, and was an admission of Armour, C.J. the truth of the facts stated in these paragraphs, and to such a replication Con. Rule 403* has no application.

The facts set out in these paragraphs of the statement of defence being admitted to be true, they furnish, in my opinion, a good defence to the action, upon the authority of *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, and *Vadala v. Larwes*, 25 Q. B. D. 310.

In the latter case, referring to the former case, Lindley, L.J., said (p. 316): "I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion you can re-open the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court." And again he said (p. 318): "Not only where there has been a fraud on the Court by what is called extrinsic circumstances, * * but where the plaintiff has obtained judgment by the use of perjured evidence, that is such a fraud as would enable the defendant to impeach the foreign judgment."

The plaintiffs in the case in judgment by their replication admit that the order for the judgment referred to in the statement of claim was obtained upon a false affidavit, and that by their fraudulently concealing from the Court the true nature of the transactions between them and the defendant they obtained the said judgment, and their admission of these facts brings the case entirely within the decision in the case of *Vadala v. Larwes*, 25 Q. B. D. 310.

*403. Save as otherwise provided, the silence of a pleading as to any allegations contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation; and any allegation introduced for the purpose of preventing such implied admission, and not for the purpose of making intelligible the grounds of defence, is to be considered impertinent.

Judgment. It is said, however, that we ought to follow the decision of our own Court of Appeal in *Woodruff v. McLennan*, 14 A. R. 242, in preference to the decision of the Court of Appeal in England in *Vadala v. Lawes*.

I do not, however, see the wisdom or propriety of such a course, although it was adopted in *Macdonald v. McDonald*, 11 O. R. 187, and *McDonald v. Elliott*, 12 O. R. 98.

For the Judicial Committee of the Privy Council, our highest appellate tribunal, in *Trimble v. Hill*, 5 App. Cas. 342, expressed the opinion that as to the matter there in controversy, the Colonial Courts ought to have followed the judgment of the Court of Appeal in England; and if so as to the matter in controversy in that case, much more ought they to do so in this, involving, as it does, a question of such wide and general interest as the binding effect of a foreign judgment.

We think, however, that under the circumstances the plaintiffs ought to be relieved from the consequences of their pleading as they did, and the plaintiffs may, if they so elect within ten days, have a new trial upon payment of the costs of the last trial and of this motion within one month, and may thereupon amend their pleadings as they may be advised upon payment of costs, and if they do not so elect, or having so elected, do not pay the said costs within the time above limited therefor, judgment shall be entered for the defendant dismissing the action with costs.

E. B. B.

[QUEEN'S BENCH DIVISION.]

DOLEN ET AL. V. METROPOLITAN LIFE INSURANCE COMPANY
ET AL.

Life Insurance—Policy—Interest and Rights of Insured and of Beneficiaries—Assignment of Policy to Secure Debt—Judgment for Debt, Effect of—Loss of Assignment—Secondary Evidence—Affidavits—Rule 585—Costs.

Where an insurance was effected upon the life of a person for the benefit of her father, brothers, and sisters, the plaintiffs :—

Held, that the beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, and the contract of the insurers being to pay them the moneys payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them or of their right to call upon the insurers for payment; and an assignment made by her and her father to a stranger to secure a debt had no effect upon such interest or right of the plaintiffs, except that of the father; and the assignee, under the circumstances in evidence, became the mortgagee of such interest and right; and the recovery of a judgment by the assignee against the father for the amount of the debt did not prejudicially affect the security.

Further evidence of the loss of the policy by affidavit received by the Divisional Court under Con. Rule 585.

Consideration of question of costs.

THIS was an action brought by Edward Dolen, Ellen Dolen, Matey Rogerson, Edward J. Dolen, Frederick Dolen, Edith Dolen, and Harry Dolen, the last three of whom sued by their next friend Edward Dolen, against the Metropolitan Life Insurance Company, upon a policy of insurance for \$500 issued by the company on the 18th May, 1891, upon the life of Frances E. Dolen, effected for the benefit of her father, brothers, and sisters, the plaintiff Edward Dolen being her father, and the other plaintiffs her brothers and sisters, the insured having died on the 30th day of October, 1892. After statement of defence filed the company applied and had Agnes Lamb, who claimed to hold an assignment of the policy from the insured and Edward Dolen, made a party defendant, and abandoned their defence to the action and paid the money payable by the policy into Court; and Agnes Lamb, having been made a party, by her statement of defence

Statement. alleged: (1) that she was a grocer residing and carrying on business in the city of Toronto; (2) that the policy referred to in the statement of claim was assigned to and deposited with her by the assured Frances E. Dolen, with the knowledge and concurrence of the above named plaintiffs, to secure an indebtedness due to her from the said Frances E. Dolen and Edward Dolen; (3) that since the month of July, 1891, she regularly paid to the company all premiums payable under the policy, amounting in all to the sum of \$17.94, and the company received and accepted the said payments with full knowledge of the assignment, and concurred in the same; (4) she submitted that she held the said policy so assigned to secure the sum of \$95.47, the amount of the said indebtedness and interest from the 8th day of September, 1891, and \$17.94 premiums paid on the policy by her, together with interest thereon from the dates of the various respective payments; (5) that she had been at all times, and was then, ready to deliver up the policy to the persons entitled thereto upon being paid the said sums due to her, with interest thereon.

To which statement of defence by the said Agnes Lamb the plaintiffs replied: (1) that they admitted the first paragraph thereof; (2) that they denied the second, third, and fourth paragraphs thereof; (3) that the defendant Agnes Lamb paid the premiums, amounting to the sum of \$17.94, or thereabouts, as a friend of the deceased, and the plaintiffs were willing that the amount paid should be deducted from the money paid into Court by the company.

The cause came down for trial before STREET, J., on the 20th October, 1893, when the defendant Agnes Lamb objected that the plaintiffs had no *locus standi*; that the insurance money was not payable to the plaintiffs, but to the executor or administrator; and that no executor or administrator was a party to the action. This objection was not taken in the pleadings, but, upon looking at the policy, the learned Judge was of opinion that it was

ambiguous upon the point as to the person entitled to the money; he thereupon directed the case to stand over for trial in order that the present representative, or any other persons who might claim, might be made parties to the action, and might be heard upon the construction of the policy, and that issues might be settled for trial, and he reserved the costs of the then present Court to be disposed of at the trial. Statement.

The cause again came down for trial at the Sittings of this Court at Toronto in January, 1894, and it was admitted that the debt claimed by the defendant Agnes Lamb was due to her; but the contest was as to whether the policy had been assigned by the insured and the plaintiff Edward Dolen to the defendant Agnes Lamb, such assignment not being produced, but secondary evidence being given of it; and the learned Judge found that such assignment had been so made, and he ordered that judgment be entered ordering that there be paid out of Court to the defendant Agnes Lamb the sum of \$125.88, together with her costs of defence (not including, however, the costs incurred at the October Assizes, which were to be borne by the parties without recourse against one another), and that the balance of the money in Court should be paid out to the plaintiffs other than the plaintiff Edward Dolen.

On the 30th May, 1894, *M. G. Cameron* (*W. J. Elliott* with him), for the plaintiffs, moved before the Divisional Court (*ARMOUR, C. J.*, and *FALCONBRIDGE, J.*), to set aside, vary, or amend the said judgment, and to enter judgment for the plaintiffs, or the plaintiffs other than the plaintiff Edward Dolen, or for a new trial, on the following grounds: (1) that the evidence clearly shewed that no assignment of the policy was executed and delivered as required by the rules of the company; (2) that the defendant Agnes Lamb had sued and obtained judgment against the plaintiff Edward Dolen for the amount of her account against him after the alleged assignment, and that the said judgment merged said account and all her rights as against the

Argument. policy under the alleged assignment, even if made ; (3) that the said Agnes Lamb was offered the full share of the said Edward Dolen under the policy, and the amount of premiums paid by her before action, but refused to accept it without payment of half of the residue of the policy coming to the plaintiffs other than the plaintiff Edward Dolen ; (4) that if there was an assignment as alleged, it was only signed by the assured and her father Edward Dolen, and not by any of the other beneficiaries, as required by law and by the rules of the company, and it was not a good assignment of their share of the policy, nor was it in any respect a good or valid assignment ; (5) there was no legal evidence given of the contents of the alleged assignment ; some evidence, it is submitted, was improperly received of its contents, as no evidence of loss of the alleged assignment was given to make the admission of secondary evidence allowable ; (6) that the learned Judge was wrong in making the shares of Matey Rogerson, Edward J. Dolen, Frederick Dolen, Edith Dolen, and Harry Dolen, liable for said indebtedness, or the costs of the action, or the costs of proving the claim of the said Agnes Lamb, as it was not their indebtedness, and they had not signed the alleged assignment ; (7) that the plaintiffs Frederick Dolen, Edith Dolen, and Harry Dolen being infants, their shares were not liable for costs of action ; (8) that the amount of the defendant's claim was without the jurisdiction of the Court, and should have been entered in the Division Court, and garnishee proceedings instituted, and the learned Judge was wrong in allowing High Court costs, when they should have been on the Division Court scale ; (9) and upon the ground that the said judgment was against law and evidence ; and upon grounds disclosed in the pleadings ; and for such further or other order as to the Court should seem meet.

Fair, for the defendant Agnes Lamb, shewed cause.

December 19, 1894. The judgment of the Court was delivered by

ARMOUR, C. J. :—

Judgment.

Armour, C.J.

It having been shewn at the trial that an assignment of the policy had in fact been made, but it being doubtful whether sufficient evidence of its loss had been given to warrant the learned Judge in admitting secondary evidence of its contents, we allowed further evidence to be given by affidavit of such loss, under Con. Rule 585, and, in pursuance of the leave so given, affidavits have now been filed which, in our opinion, satisfy the conditions upon which secondary evidence could be given of such contents, and such evidence of its contents having been given at the trial, we think it was well found by the learned Judge that an assignment, according to the form in use by the company, and produced at the trial, had been executed by the insured and the plaintiff Edward Dolen: *Regina v. Inhabitants of Kenilworth*, 7 Q. B. 642; *Regina v. Inhabitants of Braintree*, 1 Ell. & Ell. 57; *Smith v. Smith*, 10 Ir. R. Eq. 273.

The beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, the father and brothers and sisters of the insured, and the contract of the company being to pay them the moneys payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them, and of their right to call upon the company for payment: *Washington Central Bank v. Hume*, 128 U. S. 195; *Re Richardson*, 47 L. T. N. S. 514.

The assignment, therefore, made by the insured to the defendant Agnes Lamb had no effect upon the interest of the plaintiffs in the policy, or upon their right to call upon the company for payment.

The assignment, however, by the plaintiff Edward Dolen was effectual to transfer to the defendant Agnes Lamb his beneficial interest in the policy, and his right to call upon the company for payment: *Proctor v. Graham*, 24 O. R. 607.

And under the circumstances shewn in evidence, the defendant Agnes Lamb became the mortgagee of such beneficial interest and of such right for securing to her the

Judgment. amount of the debt due to her by the plaintiff Edward Armour, C.J. Dolen, with interest.

It is clear that the recovery of a judgment by the defendant Agnes Lamb against the plaintiff Edward Dolen for the amount of her debt did not in any way prejudicially affect her mortgage security.

It was not set up in the pleadings that the defendant Agnes Lamb was offered before action the full share of the plaintiff Edward Dolen under the said policy, nor would such defence have availed anything unless accompanied by a payment into Court of the amount of such share.

The plaintiffs in their replication submitted to the payment out of the money in Court to the defendant Agnes Lamb of the premiums of insurance paid by her in respect of the said policy, amounting to the sum of \$17.94.

The plaintiffs joined in their replication in resisting the claim of the defendant Agnes Lamb, and, having failed, must bear the costs of the litigation, and we see no reason why the costs should not be on the scale of the costs of the Court in which the plaintiffs brought their action.

Owing to a mistake in the record in leaving out the names of two plaintiffs, the learned Judge dealt with the case as if there were five plaintiffs instead of seven, as there really were, and his judgment must be varied accordingly.

The sum of \$17.94, the amount paid by the defendant Agnes Lamb for premiums on the policy, will be paid out of the money in Court to her.

And one-seventh of the balance of the money in Court, and accrued interest thereon, will be paid to the defendant Agnes Lamb on account of her said debt and interest.

And the costs of the defendant Agnes Lamb as awarded by the learned Judge, together with the costs of this motion, shall be paid to the defendant Agnes Lamb out of the residue of the money in Court, and if there be any balance, it shall be paid to the plaintiffs other than Edward Dolen, in equal shares.

[QUEEN'S BENCH DIVISION.]

PORT ELGIN PUBLIC SCHOOL BOARD V. EBY ET AL.

*Principal and Surety—Bond—Condition—Breach—Demand—Executors
and Administrators—Liability of Sureties.*

It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal *on demand* of all moneys received and not paid out by him, that a personal demand of payment should be made on him.

And where the principal in a bond so conditioned dies before any demand for payment is personally made on him, a demand on his personal representatives is insufficient to charge the sureties.

ONE William H. Ruby was the plaintiffs' treasurer Statement.
for many years, and down to the time of his death, in August, 1892.

On the 30th September, 1880, Ruby, the defendant Eby, and the defendant Carroll, executed a joint and several bond in favour of the plaintiffs in the penal sum of \$3,000, conditioned that Ruby should receive and safely keep and faithfully disburse, upon the order of the plaintiffs, all moneys collected by public school rate, rate bill, subscription, or otherwise by the authority of the plaintiffs, and should deliver up to the order in writing of a school auditor or the plaintiffs, when called for, all papers and vouchers in his custody, and should likewise deliver up to the plaintiffs, on demand, all such moneys not paid out as aforesaid. Upon performance the bond was to be void; otherwise to remain in full force and virtue. The bond contained no recital.

This action was brought upon the bond, against Eby and Carroll, the sureties, and the Trusts Corporation of Ontario, the administrators of the estate of Ruby.

The plaintiffs alleged that at the time of Ruby's death there was in his hands \$617.85, moneys received by him as treasurer, within the meaning of the description of the moneys mentioned in the bond, and not paid out by him; that they had demanded payment of that sum from the

Statement. defendants, who had neglected and refused to pay it; and the plaintiffs now claimed it in this action.

The defendants the Trusts Corporation of Ontario alleged that the estate that had come to their hands was not sufficient to pay the debts; that they were administering the assets, and were prepared to pay the proper claim of the plaintiffs or a ratable proportion thereof equally with the other creditors, out of such assets, in due course of administration.

The defendants Eby and Carroll set up several defences; among others, that no demand was ever made by the plaintiffs on Ruby for the payment of the moneys now claimed.

The action was tried before FERGUSON, J., without a jury, at Walkerton, in the Spring of 1894.

May 29, 1894. FERGUSON, J.—(after setting out the facts):—

There is evidence going to shew that there was in the hands of Ruby at the time of his death the sum of \$617.85. This evidence seems quite sufficient to make a *prima facie* case as to this element of the action, and the parties expect a reference to ascertain the true amount in case the conclusion should be in favour of the plaintiffs.

As to the demand. Ruby died on the 8th day of August, 1892. A demand dated the 1st day of September, 1893, signed by the chairman of the plaintiffs' board, and by their solicitor, was served upon the defendants the Trusts Corporation, the receipt of which was acknowledged by letter dated the 4th September, 1893, and before action. This demand, though short, seems to me sufficiently specific. On the 3rd day of September, 1892, the plaintiffs' solicitor wrote the defendants Eby and Carroll advising them of the bond, setting forth the condition of it, and further informing them that the auditors had found due by Ruby to the plaintiffs the sum of \$617.85; and on the 3rd day of

October, 1892, a demand of payment of this sum, signed ^{Judgment.} by the plaintiffs' solicitor, was served upon the defendant ^{Ferguson, J.} Eby, and a copy mailed to the defendant Carroll, the letter being registered.

It is true that no demand was made personally upon Ruby, so far as shewn, but one does not see how this could be expected. A careful perusal of the case *Provisional Corporation of Bruce v. Cromar*, 22 U. C. R. 321, shews, as I think, that it is an authority for saying that the demand in the present case is good. It was made upon the sole administrator. I do not see how the fact of the executors or administrators not being mentioned in the condition of the bond as persons on whom the demand might be made, makes the case in this regard different from the one above referred to.

I am of opinion that this objection as to the demand should not be allowed to prevail.

It was contended that there was no default by Ruby, and that there could be no recovery on the bond for this reason. I think that the default in respect of which complaint is now made occurred after demand made upon Ruby's administrators.

[The learned Judge then dealt at length with the other defences, and concluded:]

On the whole case, I am of the opinion that the plaintiffs are entitled to recover on this bond against all these defendants, and there will, as was mentioned at the trial, be a reference to the Master at Walkerton to inquire and report as to the amount of the liability of the defendants (the Trusts Corporation as administrators only).

At the Michaelmas Sittings of the Divisional Court the defendants Eby and Carroll appealed from the judgment of FERGUSON, J., and their appeal was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 21st November, 1894.

Shaw, Q. C., for the appellants.

Shepley, Q. C., for the plaintiffs.

D. Armour, for the defendants the Trusts Corporation.

Judgment. December 19, 1894. The judgment of the Court was
Armour, C.J. delivered by

ARMOUR, C. J. :—

There can, in my opinion, be no recovery upon the bond in question in this action against the sureties, for there has been no breach of the condition of the said bond shewn.

No demand was ever made upon Ruby for payment, and without such demand there could be no recovery : see Chitty on Pleading, p. 340 ; *Provisional Corporation of Bruce v. Cromar*, 22 U. C. R. 321 ; *Simpson v. Routh*, 2 B. & C. 682, where it is said by Littledale, J. : “ But in other instances, such as a bond with a penalty to pay a certain sum on demand, there an express demand must be made before the action can be maintained.”

And such demand must be made personally : Viner’s Abridgt., Condition (P. b.) 2.

A demand was shewn upon the administrators of Ruby, but this could not work any breach of the condition, for the condition was not that if Ruby and his administrators should deliver up the moneys, but that if Ruby should deliver them up, and the sureties were not bound for the default of Ruby’s administrators, but only for the default of Ruby himself ; and to extend their liability to the default of Ruby’s administrators would be to make a new contract for them, and one into which they never entered.

Besides, “ the conditions of obligations are always for the benefit of the obligor, and shall be expounded liberally for him :” *Grenningham v. Ever*, Cro. Eliz. 396, 539 ; *Bassett v. Bassett*, 1 Mod. 264.

In Addison on Contracts, 9th ed., at p. 1012, it is said that “ where the liability of the surety does not arise until after default has been made by the principal, and the latter dies before making default, the surety is discharged :” *Sparrow v. Sowgate*, W. Jones 29.

The action must, therefore, in my opinion, be dismissed with costs.

E. B. B.

[CHANCERY DIVISION.]

THE SCOTTISH AMERICAN INVESTMENT CO. V. SEXTON ET AL.

THE SCOTTISH AMERICAN INVESTMENT CO. V. SEXTON.

*Fixtures—Mortgage— Dwelling-house— Hot-air Furnace—Removal of—
Right to Replacement.*

A hot-air furnace fixed to the floor by screws and placed in a dwelling-house, during its construction, by a mortgagor, in pursuance of the agreement for the loan on the property, cannot be removed by him during the currency of the mortgage. The mortgagee is entitled to an order restraining its removal, and if removed no title to it passes as against the mortgagee even to an innocent purchaser, and the former is entitled to an order for its replacement.

THESE were two actions brought by a loan company to Statement. restrain the defendants in the first action from removing two hot-air furnaces from houses mortgaged to the plaintiffs, and to compel the defendant in the second action to deliver up five similar furnaces, which had been removed and placed in houses belonging to her.

It appeared that Elizabeth Sexton and William Francis Sexton, the younger, had obtained a loan from the plaintiffs upon the security of seven houses on Shaw street, in the city of Toronto.

At the time of the application for the loan it was represented by the borrower that the houses would be complete in every respect *including furnaces*, and it was agreed that the money should not be advanced, and it was not advanced by the plaintiffs until the furnaces were actually placed in the houses.

After default in payment of the mortgage, the plaintiffs discovered that William Francis Sexton, had removed five of the furnaces from the mortgaged premises and placed them in certain other houses on Clinton street, in the city of Toronto, belonging to his mother, Mary Ann Sexton, the defendant in the second action, and proposed to remove the other two.

The actions were tried together at Toronto, on October 30th, 1894, before FERGUSON, J.

Argument. There was evidence to shew that the furnaces were placed upon the cellar floors in the houses in which they had been placed, and could have been taken out by removing some screws and withdrawing the pipes.

Cassels, Q. C., and *H. C. Fowler*, for the plaintiffs. The property in the furnaces was in the plaintiffs as mortgagees, as they were part of the stipulated security. The wrongdoer, in taking them away could confer no title, and those taken away can be returned without serious damage to the freehold. We refer to *Stockwell v. Campbell*, 39 Conn. 362; *The Stevens, etc., Manufacturing Co. v. Barfoot*, 9 O. R. at p. 696, and 13 A. R. 366; *Thomas v. Inglis*, 7 O. R. 588, 600; *Polson v. Degeer*, 12 O. R. 275, 280.

J. E. Cook, for the defendants. The furnaces were not fixtures, and the mortgagor had the right to remove them: *Keefer v. Merrill*, 6 A. R. 121; *Gardiner v. Parker*, 18 Gr. 26.

At the close of the case,

October 31st, 1894. FERGUSON, J. :—

The mortgage, on its face, is a mortgage on lands. It contains a provision that the mortgagee should not be bound to advance the money. The agreement, as shewn by the evidence, was that it should not be advanced until the houses should be completed, including the furnaces; and it was not advanced by the plaintiffs till completion of the houses, including the furnaces, and would not otherwise have been advanced.

From the conduct of the parties and what passed between them and their agents, it seems to me, beyond doubt, that it was intended that the plaintiffs' security should be upon the houses, including the furnaces. The furnaces were put into the houses for the purpose of improving the freehold, and I think the evidence shews that they were a part of the original design of the buildings.

The contention that the furnaces could be taken out by only undoing screws in pipes, and that they were, therefore, chattels, would apply as well, as shewn by the evidence, to whole systems of heating by steam and hot water, and this, in some instances at least, would, I think, lead to great absurdity. The case of *Stockwell v. Campbell*, 39 Conn. 362, seems very close in point in the plaintiffs' favour.

The furnaces that were removed were as between the mortgagees and the mortgagors part of the freehold, I think, beyond question, and the intention of putting them in was to improve the freehold; and I think Francis Sexton, the younger, was entirely in the wrong in removing them.

Then assuming that the plaintiffs as mortgagees, were owners of the furnaces, that is, to the extent of their right, the wrongful taking of them by the defendant Francis Sexton, the younger, would not place him in a position to pass title to the property in them to his mother, even if it were to be supposed that she was an innocent purchaser for value, a thing that I do not upon the evidence suppose.

I find, upon the evidence, that the furnaces can be removed from the buildings, in which they are without material injury to the buildings or any of them, and I am of the opinion that the defendants in the second action cannot hold these five furnaces, or any of them, against the mortgagees.

I abstain from saying many things with regard to this action that perhaps I might with propriety say. A good deal passed during the time the evidence was being given that perhaps indicated the view that was being taken with reference to the evidence. I did at one time think that I would make a plain and bold statement in regard to the conduct of these defendants, this family, with respect to the plaintiffs' rights; but perhaps it is just as well that I should abstain from doing that, as it seldom does much good, and is really not a part of the case, which is a case resting upon the legal rights of the parties.

Judgment. In the first action the injunction will be made permanent. There will be a mandatory order upon the defendant Francis Sexton, the younger, and the defendant Elizabeth Sexton, his wife, for the restoration of the furnaces in addition to the usual mortgage judgment, which it is conceded the plaintiffs are entitled to with costs, and the costs of the injunction motion.

Ferguson, J.

In the second action there will be a declaration that the five furnaces in the Clinton street houses are the property of the plaintiffs as mortgagees, and an order upon the defendant in that action for the delivery of the furnaces to the plaintiffs within a reasonable time, and this judgment shall also be with costs.

If any amendments are necessary, the plaintiffs may make them.

If Francis Sexton, the younger, and his wife, choose to pay the value of the furnaces as they were in the houses on Shaw street before the removal, which value I think has been proved here at \$70 or \$75 each, by witnesses called by the defence, then the order for the restoration is not to be acted upon.

G. A. B.

[QUEEN'S BENCH DIVISION.]

MARTIN V. CHANDLAR ET AL.

Will—Failure of Issue—Meaning of—R. S. O. ch. 109, sec. 32.

By his will, testator devised to his son the use of and during his lifetime certain land, but if he died without issue, then it was to be equally divided between two named grandsons, and by a subsequent clause, on the death of testator's widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him :—

Held, that under R. S. O. ch. 109, sec. 32, the failure of issue referred to was a failure during the son's lifetime or at his death and not an indefinite failure, and that by virtue of the subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue.

Re Bird and Barnard's Contract, 59 L. J. T. N. S. 166, and *Stobbart v. Guardhouse*, 7 O. R. 239, distinguished.

ON the 21st of March, 1891, the plaintiff became the Statement.
purchaser at sheriff's sale under a *fi. fa.* against the lands of William Paul Quinn Chandlar, of all his interest in the north-west half of lot No. 4, in the 7th concession of the township of Chatham; and this action was brought for the construction of the will of the late William Chandlar, and asking that the plaintiff's rights and interests be declared under the second paragraph of the will.

The plaintiff claimed under a deed from the sheriff made to him in pursuance of the sale.

The second clause of the will, which was dated the 18th of August, 1877, was as follows :—"To my son William Paul Quinn I give and bequeath the use of and during his lifetime of the north-west quarter of lot No. 4 in the 7th concession of the said township of Chatham, and should he die without issue, then the one-half of the said land to go and be vested to George Scott, my grandson, and the other half of the said property to my grandson Marcellas Anderson, to be equally divided between the two boys."

The tenth clause of the will was: "And at the death of my wife the estate belonging to me in the town

Statement. of Chatham before mentioned, and all other property of my estate not bequeathed in this my will, to be equally divided among all my children, that is, my executors are hereby authorized and empowered to sell said estate and divide the proceeds among all my children."

William Paul Quinn Chandlar died in July, 1892, leaving issue him surviving the defendants Daisey Chandlar and Lillie Chandlar.

Clara Chandlar, the widow of the testator, died prior to the death of her son William Paul Quinn Chandlar.

September 19, 1894. *Aylesworth*, Q. C., for the plaintiff.
McBrady, for the widow of William Paul Quinn Chandlar.

C. J. Holman, for the executors and Marcellas Anderson.
J. Hoskin, Q. C., for the infant defendants.

September 28, 1894. MACMAHON, J.:—

In support of Mr. Aylesworth's contention that an estate tail by implication was given to William Paul Quinn, he relied upon *Re Bird and Barnard's Contract*, W. N. (1888) 139, 59 L. T. N. S. 166, and *Stobbart v. Guardhouse* 7 O. R. 239. The wills in both these cases were executed before the passing of the Wills Act. In *Bird and Barnard's Contract* the will was executed in 1836 (the Wills Act coming into force in England in 1837), and in the *Stobbart* case the will was dated in 1862—the Wills Act having been passed in Ontario in 1874.

The change created by the Imperial Wills Act, 1 Vict. ch. 26, sec. 29 (from which our Act R. S. O. ch. 109, sec. 32, is taken), is clearly stated in Jarman on Wills, 5th ed., 521: "No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the statute 1 Vict. ch. 26, sec. 29, provides that such words shall be held to mean a failure

of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will." And at p. 1321, the author, after stating the rule of construction under the old law, and pointing out that the rule of construction thereunder is abrogated in regard to wills made or republished since the year 1837, says: "The result then of this enactment" (1 Vict. ch. 26, sec. 29) "appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established:—first, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, *i. e.*, where the words *may* import *either* a failure of issue in the lifetime or at the death, *or* an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837 devise real estate to A, or to A and his heirs, and if A shall die and his issue shall fail *at any time*, then to B, A will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine."

Judgment.
MacMahon,
J.

William Paul Quinn Chandlar took an estate for life in the lands mentioned in the second paragraph of the will, with an executory devise over to the grandchildren of the testator George Scott and Marcellas Anderson in the event of William Paul Quinn dying without issue. Upon the termination of such life estate the lands in question fell into and formed part of the residue of the testator's estate to be divided as provided in the tenth paragraph of the will. The testator having left six children, William Paul Quinn was entitled to a one-sixth share of the residue arising from the said lands, and the plaintiff is entitled to receive such share.

The executors are directed by the will as to the manner in which the residue is to be dealt with.

Judgment. As the suit is for the construction of the will, the costs of all parties will be paid out of the estate in respect of which the action is brought.

MacMahon,
J.

G. F. H.

[COMMON PLEAS DIVISION.]

DINGMAN V. HARRIS.

*Husband and Wife—Liability of Married Woman as Co-contractor—
Separate Estate.*

A married woman having separate estate may enter into a contract along with others.

Semble, if she having no separate estate is not liable under such a contract, the other contractors are liable without her.

Statement. THIS was a motion for judgment in an action on a covenant contained in a mortgage to pay the mortgage money made by several persons, one of whom was a married woman.

The statement of claim, which alleged that the married woman had separate estate, was demurred to on the ground that it shewed that the plaintiff's claim was on a joint covenant by all the defendants, one of whom was alleged in the statement of claim to be a married woman, and that a married woman could not covenant jointly with others who were *sui juris*.

There was also a motion for judgment against the other defendants on admissions made on the examination for discovery.

On September 4th, 1894, the motion for judgment was argued before ROSE, J., in Court.

Kilmer, on behalf of the defendants, other than the defendant Harris, supported the demurrer. A married woman cannot be sued on a joint covenant: *Horner v. Kerr*, 6 A. R. 30; *Dacey on Parties to Action*, 33. Her capacity to contract, in any event, depends on her being possessed of separate

estate at the time of the contract, and no such estate is shewn here: *Stogden v. Lee*, [1891] 1 Q. B. 661; *Moore v. Jackson*, 16 A. R. 431. In the case of *Hoare v. Nibbett*, [1891] 1 Q. B. 782, there is a dictum of A. L. Smith, J., that she could enter into such a contract, but the ground the judgment proceeded on was that judgment having been obtained against one of the joint contractors it constituted a bar to the action. Argument.

W. Davidson, for the defendant Harris, opposed the motion for judgment. The action must also fail against the defendant Harris if it is not maintainable against the married woman, for in a joint action all the joint contractors must be sued together: *Boyle v. Webster*, 17 Q. B. 950.

Rowan, for the plaintiff, contra. Under the Married Woman's Property Acts a married woman has, with reference to her separate estate, the same capacity to contract as any other person not under disability, except that the form of the judgment against her must be limited to her separate estate. The evidence clearly establishes that the married woman had separate estate at the time she entered into the contract, and so under the Married Woman's Property Acts she was liable on her contract, and entitled to be sued jointly with the other joint contractors.

September 17, 1894. ROSE, J.:—

The demurrer must be overruled. In my opinion a married woman having separate estate under present legislation may enter in a contract along with others. The form of the judgment will require care, but there is nothing that I know of to prevent her being a co-contractor.

I do not think those who joined with her in the covenant are concerned with the question whether or not she had separate estate at the date of covenanting.

If the argument is to prevail that without separate estate a married woman cannot contract, and so cannot become a co-contractor, then those who entered into a

Judgment.

Rose, J.

covenant jointly with a married woman, could be sued separately—her name not being joined or mentioned in the pleadings.

If I am correct in my judgment on the demurrer, then, if Mrs. Sheppard had separate estate, she could join in a covenant along with her co-defendants.

It becomes, therefore, a question of pleading, and the defendants, other than Mrs. Sheppard, are liable in either event.

[The learned Judge then considered the evidence given on the examination for discovery as to Mrs. Sheppard's separate estate, and continued :]

As I have said, the fact whether or not Mrs. Sheppard had separate estate at the date of the covenant (the 1st of January, 1892), can only affect the question of her being a party to the action, her co-defendants being equally liable whether she is or is not liable.

I think she is properly a defendant, and that, on the evidence as against her, there can be no doubt as to her having had separate estate at the date of the covenant. See Dicey on Parties to Action, pp. 233 and 295, and cases there cited ; also *Chandler v. Parke*, 3 Esp. p. 76.

The demurrer will be overruled with costs, and judgment granted for the plaintiff with costs. The judgment against Mrs. Sheppard will not be general, but in the usual form as against married women having separate estate.

G. F. H.

[QUEEN'S BENCH DIVISION.]

KOCH V. HEISEY.

Will—Legacy to Widow in Lieu of Dower—Right to Annual Specific Sum—Children of Deceased Child—Right to Parent's Share—R. S. O. ch. 109, sec. 36.

A testator by his will bequeathed to his wife \$150 a year, payable half-yearly out of the rent of his farm until the sale thereof, when she was to be paid the interest on \$2,500 at 6 per cent., or the \$150. On the sale, \$2,500 was to be left on mortgage or invested by the executors at interest payable half-yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies were given to each of testator's twelve children (one of whom was dead at the date of the will), to be paid out of the proceeds of the sale of the real estate. The residue of the deceased daughter's legacy was directed to be placed at interest and divided equally between her surviving children on their attaining twenty-one years, and in case any of testator's children died before receiving their full shares and leaving issue, the deceased's child's share was to be equally divided between his or her children; if such deceased child died without issue, his or her share was to be divided equally between his or her surviving brothers and sisters. All the residue of the estate, not thereinbefore disposed of, he gave to his children "and their issue as aforesaid provided for," to be divided equally between them from time to time as the money should become payable. The estate proved insufficient to provide for the annuity and payment of the legacies in full, and the annual interest obtainable on the \$2,500 was less than \$150:—

Held, that there was a gift to the widow of \$150 a year, and not merely of the annual interest derivable from the investment of the \$2,500, and that she was entitled to have it paid out of the residue in priority to the other legatees:—

Held, also, that the deceased daughter's children were entitled to share in the residue.

THIS was an action for the construction of the will of Christian Heisey, argued before MEREDITH, C. J., in Court, on November 13, 1894. Statement.

G. W. Holmes, for the plaintiff.

T. M. Higgins, for the defendants Selina Heisey and Albert Heisey.

Dr. Hoskin, Q. C., for the infant defendants.

J. McCullough, for the defendant Jacob Heisey.

Gregory, for the defendant Campbell.

J. W. McCullough, for the other defendants.

Judgment. November 24, 1894. MEREDITH, C. J. :—

Meredith,
C.J.

The will bears date the 6th of February, 1892, and the testator died on the 11th day of June in the same year.

Two questions arise: One as to the rights of the widow in respect to the annuity which is given to her; and the other as to the effect of the residuary clause.

The provisions of the will, so far as they are material to the present inquiry, are the following:—

“ I further give and bequeath to my wife \$150 a year, in half-yearly payments of seventy-five dollars each, to be paid to her out of the rent of my farm where I now live, the first payment to be made on the 1st of October or April after my decease until my farm shall be sold; and after the sale of my farm I give to my beloved wife the interest on \$2,500, at six per cent., or the above \$150, payable as above half-yearly so long only as she remains my widow.”

The testator then gives directions for the sale of the farm within three years after his decease, the purchaser to pay not less than \$3,000 at the time of purchase; and then follows this provision: “ And the balance to be paid as my executors may consider for the best interest of my legatees. I direct that my executors leave \$2,500 in mortgage on the land, or invest that amount on real estate on first-class mortgage at interest payable half-yearly, and pay the same to my wife during her lifetime, or remains (*sic.*) my widow.”

This provision is declared to be in lieu of dower.

The testator then bequeaths legacies of \$500 to each of his twelve children (one of whom, Martha Tefft, was dead at the date of the will), which he directs to be paid out of the proceeds of the sale of his real estate; and he desires that his son Jacob shall have his \$500, or a part of it, out of the first sum realized from the sale.

Provision is then made that the residue of the legacy bequeathed to the deceased daughter is to be placed at interest and be divided equally between her surviving

children proportionately as they arrive at the age of twenty-one years. Following this is a provision that in case any of the testator's children should die before receiving their full shares and leaving issue, the deceased's share shall be equally divided between his or her children; and that should any of his (the testator's) children die without issue his or her share shall be divided equally between the surviving brothers and sisters of the deceased.

Judgment.
Meredith,
C.J.

The residuary clause is in these words: "All the residue of my estate, not hereinbefore disposed of, I give, devise and bequeath unto my said children and their issue as aforesaid provided for, to be divided between them, my children, share and share alike, from time to time as the money shall become available."

The estate is insufficient to provide for the annuity to the widow and for the payment of the legacies in full, and the annual interest upon an investment of \$2,500 will amount to considerably less than \$150.

It was contended on behalf of the residuary legatees that the annuity to the widow is limited to the annual income derived from the investment of the \$2,500; but I am of opinion that the contention is not well founded.

The will contains in the earlier part of it a clear and distinct gift to the widow of an annuity of \$150 during widowhood; and, whatever one may conjecture as to what the testator might have done had the existing condition of things been present to his mind, I am of opinion that the subsequent direction as to the investment of the \$2,500, and the payment of the interest of it to the widow, is not sufficient to indicate an intention to cut down that gift to a bequest of the interest only of the fund directed to be invested.

The widow is, I think, entitled to be paid her annuity in priority to the other legatees. Being given to her in lieu of dower she does not stand in the position of a volunteer, and the annuity is therefore entitled to a preference of payment over the other legacies given by the will

Judgment. Williams on Executors, 9th ed., 1217; *Re Greenwood*,
Meredith, [1892] 2 Ch. 295.
C.J.

She is also entitled to have, whatever the interest of the \$2,500 may prove insufficient to pay provided for out of the residue of the estate.

The gift being, as I have determined, a gift of an annuity not so limited as to make it payable exclusively out of the income of the \$2,500 during the lifetime of the annuitant, the authorities shew that it is a charge on the corpus of the estate which must be applied, so far as may be necessary, for that purpose in making up what the income of the fund is insufficient to pay: *Re Mason*, *Mason v. Robinson*, 8 Ch. D. 411; *Carmichael v. Gee*, 5 App. Cas. 588; *Jones v. Jones*, 27 Gr. 317.

Then as to the effect of the residuary clause.

It was contended by counsel for the surviving children of the testator that the children of the deceased daughter Martha were not entitled to share in the residue; but I am not of that opinion.

The provision is for "the children and their issue as aforesaid provided for," language which, it seems to me, points with reasonable clearness to the scheme of division which the testator had adopted in the earlier part of the will being that which was to be followed in dealing with the residue of his estate.

That scheme was an equal division among all his children including the deceased daughter, with a special provision as to her share going to her children, and the testator has, as I construe his language, directed that the residue shall go to the same persons, and in the same shares, and subject to the same conditions as he had provided with regard to that part of his property which he had disposed of by the earlier provisions of the will—so far as the latter had been given to his children or their issue.

But if the language used is not to have that meaning given to it, the right of the deceased daughter to a share in the residue is put beyond question by section 36 of the

Wills Act of Ontario, R. S. O. ch. 109. The provisions of that section apply to death in the lifetime of the testator whether occurring before or after the date of the will: Jarman on Wills, 5th ed., 323.

Judgment.
Meredith,
C.J.

The daughter Martha having died in the lifetime of her father, leaving issue who were alive at the time of his death, the provision made for her, by force of the section referred to, enures for her benefit as if her death had happened immediately after the death of the testator.

There will, therefore, be judgment declaring the rights of the parties in accordance with the conclusions which I have arrived at, and the costs of all parties will be paid out of the estate, and those of the plaintiff will be trustee costs.

G. F. H.

[CHANCERY DIVISION.]

STEELE V. GROVER.

Will—Bequest to Poor of County—Town Detached from County for Municipal Purposes only—Right of Residents of Town to Participate in.

The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county "who must have been *bonâ fide* residents of the said county before becoming destitute or needy." A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—

Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein.

Statement. THE testatrix by her will gave the residue of her estate in trust, "for the benefit of the sober and industrious but destitute and needy widows and orphans of the county of Peterborough, who must have been *bonâ fide* residents of the said county before becoming destitute or needy."

In settling a scheme for the application of the income of the residuary estate for the charitable uses and purposes set forth in the will and certain codicils to it, as well as for the selection of the objects referred to in it, which it was by the judgment pronounced on the 24th January, 1894, referred to the Registrar of the Queen's Bench Division to do, a question arose as to whether widows and orphans resident in the town of Peterborough were included in the description given by the testatrix of the objects of her bounty.

The town of Peterborough originally formed part of the county of Peterborough for all purposes, but was in the year 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only.

E. T. Malone, for the plaintiffs.

J. A. Cartwright, Q. C., for the Attorney-General of Ontario.

Robinson, Q. C., and *Stratton*, for the county of Peterborough.

Edwards, for the town of Peterborough.

December 6, 1894. MEREDITH, C. J. :—

Judgment.

Meredith,
C.J.

It was contended for the county of Peterborough, that the will was to be construed as having reference to the county as constituted for municipal purposes, or at all events, that the contents of the will shewed that the testatrix had used the word "county" in that sense.

I am unable to agree with this contention. It is unnecessary to refer to the earlier Acts providing for the territorial division of the Province, but it is sufficient to refer to the Act 14 & 15 Vict. ch. 5, by which provision was made that Upper Canada should be divided into counties mentioned in the schedule A to the Act (one of which was the county of Peterborough), "which counties," it is declared, "shall respectively include and consist of the several townships mentioned in the said schedule as forming such county, and the cities, towns and villages and the liberties of the several cities therein."

By the Act 22 Vict. ch. 99, sec. 26, consolidated as sec. 26 of chapter 54 of the C. S. U. C., provision was for the first time made for the withdrawal of a town from the jurisdiction of the council of the county within which it is situate; and this provision has been continued substantially in the same form down to the present time, and appears as section 25 of the Consolidated Municipal Act 1892, which was the Act in force at the time of the death of the testatrix.

The Consolidated Statutes of Upper Canada ch. 3, re-enacted and continued the provisions of 14 & 15 Vict. ch. 5, as to the territorial division of Upper Canada; and it was not until the revision of the statutes in 1877, that the provision upon which the county relies, appeared in the Act providing for the territorial division of the Province; and it is there comprised in section 3 of ch. 5—and in these terms: "But for municipal purposes the said cities, and all towns withdrawn from the jurisdiction of the county, shall not form part of the several counties in which they are respectively situate." R. S. O. 1887, ch. 5, con-

Judgment.
Meredith,
C.J.

tains the existing statutory provisions for the territorial division of the Province, which, so far as concerns the present inquiry, are substantially the same as those of R. S. O. 1877, ch. 5.

On reference to the provisions of the Municipal Acts dealing with the subject of the withdrawal of towns from the counties within which they are situate, it will be seen that the withdrawal spoken of is a withdrawal from the jurisdiction of the council of the county, and the effect of it is that the town ceases to be entitled to representation in the county council, the by-laws of which no longer have any force in the town, and the town is no longer liable for the debts of the county, or to pay into the county treasury any money for county debts or other purposes. I omit any reference to some exceptions to these general results which the Acts contain, as having no bearing upon the question now under consideration.

The effect of the legislation to which I have referred, is, in my opinion, to make the town of Peterborough territorially or geographically a portion of the county of Peterborough, and it did not upon its withdrawal therefrom, cease to be a part of the county, or to be so situate within it. The effect of the withdrawal was, that it ceased, so far as the application of the provisions of the municipal law for the time being in force was concerned, to be within the jurisdiction of the council of the county, or, in the language of the Territorial Division Act "for municipal purposes," to form part of the county in which it is situate.

According to the well established canon for the construction of wills, the term "county" is *primâ facie* to be taken in its primary sense, and that, as it appears to me, is a territorial or geographical division of the Province bearing that name. It is only, as I have pointed out, *sub modo*, that the town is not to form part of the county; and, apart from the question of the effect of the context of the will, there is no reason why the words which the testatrix has used, should be limited to a municipal county. See also *Corporation of Over Darwen v. Justices of Lanca-*

shire, 15 Q. B. D. 20. No doubt, if there is anything in the will which shews that the language of the testatrix was used in a popular sense, or one differing from the primary meaning of her words of disposition, effect must be given to the provisions of the will in the sense in which as thus indicated the testatrix intended them to be understood.

Judgment.
Meredith,
C.J.

A good illustration of the application of this rule is to be found in the case of *Wallace v. Attorney-General*, 33 Beav. 384.

But in this case, I find nothing in the context of the will which would justify me in construing the provision in question in a different sense from that which I take to be its primary meaning.

It is true that in providing for the rendering of accounts by the trustees, the testatrix says that they are to be rendered to the warden and the county council of the said county of Peterborough; and that power is given to the council to remove a delinquent trustee from the trust, and to appoint a new trustee in his place.

There is much force in the argument that these provisions indicate that in speaking of a county the testatrix was referring to a county for which there was a warden and a council, and therefore, to a municipal county, and probably that consideration would have been sufficient to justify a construction in accordance with the county's contention, if it were not that when reference is made to another part of the will, we find the testatrix describing the official persons whom she appoints trustees as officials "of the said county of Peterborough." She calls them "the then presiding senior Judge, the sheriff, and the registrar of the said county of Peterborough;" these are all officials of the county as a territorial division of the Province and not of a municipal county.

It is quite possible that the testatrix may not have known of the difference between the meaning of the word "county" when used, as descriptive of a territorial division of the Province, and when used as referring to a municipal

Judgment. county, or if known to her, it may not have been present
 Meredith, to her mind in making her will. It is, however, sufficient
 C.J. for the disposition of this case that the language of the
 context is not clear and unambiguous enough to enable
 me to reach the conclusion that the testatrix in using the
 words "county of Peterborough," meant them to be de-
 scriptive of the municipal county bearing that name.

There will, therefore, be a declaration that for the pur-
 poses of the scheme to be settled for giving effect to the
 will of the testatrix, the town of Peterborough is to be
 taken to form part of the county of Peterborough.

The costs of all parties will be paid out of the fund.

G. F. H.

[COMMON PLEAS DIVISION.]

WHEELER V. BROOKE.

*Mortgage—Sale of Equity of Redemption—Mortgage of to Mortgagee—
 Right of First Mortgagor to Assignment.*

Where the plaintiff, the mortgagor of certain lands sold the same for a sum
 in excess of the amount of his mortgage, the purchaser raising such
 excess by a mortgage to the defendant, the original mortgagee, the
 plaintiff was held entitled to an assignment of the mortgage made by
 him on his paying the defendant merely the amount due thereon.

Statement. THE plaintiff who had mortgaged certain land to the
 defendant and subsequently sold the same for a sum in
 excess of the amount secured by the mortgage, the pur-
 chaser assuming the mortgage made by plaintiff and
 raising the amount of the excess by giving a second
 mortgage to the defendant. On the mortgages becoming
 due, the plaintiff, the original mortgagor, tendered to
 the defendant the amount of his mortgage, and asked to
 have an assignment made to his nominee. This the
 defendant refused to do, but offered to give the plaintiff
 a discharge or reconveyance, which plaintiff refused to

accept, and brought this action to compel the defendant to execute such assignment. Statement.

The matter came up on motion for judgment on admissions in the pleadings, before MEREDITH, C. J., in Court, on November 15, 1894.

Brewster, for the plaintiff, supported the motion. The case is governed by *Queen's College v. Claxton*, 25 O. R. 282, which is expressly in point. There, as here, notwithstanding the mortgagor had conveyed away his equity of redemption to a purchaser who had assumed the mortgage he was held entitled on payment of the amount due on the mortgage to have an assignment made to him. The plaintiff is entitled, therefore, to have judgment declaring he is entitled to such assignment.

W. H. Blake, contra. The defendant should not be compelled to do anything to the detriment of his second mortgage. He loaned the money to the purchaser from Wheeler on the faith of his already having an interest in the property by reason of his being the holder of the first mortgage. No object would be gained by the defendant executing an assignment to the plaintiff's nominee, for the moment the defendant had executed the assignment he would be entitled to redeem the nominee and compel him to execute an assignment to him, which, on being done, he would be back in his original position. The case of *Queen's College v. Claxton*, 25 O. R. 282, is quite distinguishable. There the first and second mortgages were in different hands, while here the original mortgagee was also the holder of the second mortgage. He is virtually in the same position as if the second mortgage had been given by the original mortgagor.

December 10th, 1894. MEREDITH, C. J. :—

Mr. Blake endeavoured, unsuccessfully in my view, to distinguish this case from *Queen's College v. Claxton*, 25 O. R. 282.

Judgment.
Meredith,
C.J.

The only difference between the two cases is that in this the defendant is the second mortgagee, while in the *Claxton* case the second mortgagee was a different person.

The principle upon which that case was decided is expressed by the Chancellor in these words, at p. 290: "He" (*i. e.* the mortgagor) "had conveyed all the land to others who as between him and the mortgagees were primarily liable to pay the mortgage and relieve him. So that he became merely the surety for all claiming through and under him, and was entitled on payment to have the mortgage kept alive for his protection and to enable him to recover from those who were liable to indemnify him."

Here the defendant *quoad* the second mortgagee is in the same position as the purchaser of the equity of redemption who was bound to pay off the first mortgage and to indemnify the plaintiff against it and deriving title under him took subject to that liability.

I see no difficulty likely to arise from the exercise by the defendant of his right as second mortgagee to redeem, for I apprehend that upon redemption he would not be entitled to an assignment of the liability of the plaintiff to pay the mortgage debt as that liability would then be at an end.

There will, therefore, be judgment for redemption, and a declaration that upon payment of the amount due to the defendant on the first mortgage he is bound to assign that mortgage including the debt secured by it as the plaintiff shall direct, and there will be a reference to the local Master at Brantford to settle the assignment in case the parties differ about it.

The defendant must pay the costs up to and including the judgment, and the costs of the settlement of the conveyance, if any, will be reserved, to be disposed of by a Judge in Chambers.

G. F. H.

[CHANCERY DIVISION.]

KINSEY V. KINSEY.

Will—Bequest to Agricultural Society—Restrictions against Freemasonry, etc.—Impure Personality—Validity—Bequest to Promote Free Thought—Validity.

By his will, testator directed his executors to invest \$2,000 and pay over the yearly interest to an Agricultural Society (incorporated under R. S. O. ch. 35, [1877] and thereby authorized to acquire and hold, but not to take by devise, real estate), to be applied as a premium for the best results in a specified mode of agriculture, but with a provision that all competitors should declare that they were neither Freemasons, Orangemen or Oddfellows; and, in case of neglect to comply with the conditions, the executors were to apply such yearly interest in procuring lectures against Freemasonry and other secret societies. The legacy was payable out of a mixed fund consisting in part of impure personality :—

Held, that the society came under the Mortmain Act, and, so far as the bequest consisted of impure personality, it was void :—

Held, also, that the society was not bound to expend annually the interest received, but might apply it from time to time as deemed best, so long as it acted in good faith and did not divert the money from the purpose directed by the testator.

The executors were directed to invest the residue of the estate and to apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario :—

Held, that this bequest was void as opposed to Christianity.

Pringle v. Corporation of Napanee, 43 U. C. R. 285, followed.

THIS was an action for the construction of the will and Statement.
for the administration of the estate of Joseph Hawey who died on the 8th August, 1878.

The questions as to the construction of the will were argued before MEREDITH, C. J., in Court, on November 13, 1894.

Haines, for the plaintiffs (the executors).

W. R. Riddell, for plaintiff Phœbe M. Howell, individually.

A. J. Boyd, for the infant defendants and other next of kin.

Langton, Q. C., for the Malahide Agricultural Society.

Cartwright, Q. C., for the Attorney-General for Ontario.

Judgment. December 12, 1894. MEREDITH, C. J.:—

Meredith,
C.J.

The questions as to the construction of the will argued before me arise upon the provision which the testator has made with regard to the annual income from a sum of \$2,000 directed to be set apart, and which is contained in the following terms:—

“And my will is that my said executors shall * * invest a further sum of \$2,000 in like securities, and the interest accruing therefrom pay over annually to the Malahide Agricultural Society, to be by them applied in premiums for the largest amount of grain and vegetables raised upon a given quantity of land, provided always that all competitors for premiums from this fund shall make affidavit, affirmation, or declaration before a competent officer that he or she or they are neither Freemasons, Orangemen, or Oddfellows.”

* * * * *

“And in case the Malahide Agricultural Society shall refuse or neglect to comply with the conditions upon which they are to have the annual interest of the sum of two thousand dollars, I order and direct that my executors shall expend the yearly interest accruing therefrom in procuring lectures against Freemasonry and other secret organizations.”

And upon the provision as to the disposition of the residue of his estate the proceeds of which he directs to be invested, and the annual interest of which to be employed by his executors “in such way and manner as they shall deem expedient and proper for the promotion of Free Thought and Free Speech in the Province of Ontario.”

The testator's estate consists in part of impure personality; and the first question raised, and which is applicable to both of these provisions, is as to how far, if valid charitable bequests, the testator's estate is applicable to carry them into effect.

The legacy of \$2,000 is payable out of a mixed fund consisting in part of impure personality, and it is clear,

therefore, upon the authorities, that unless the Malahide Agricultural Society is exempt from the provisions of the Mortmain Act the legacy must fail as to the impure personalty.

Judgment.
Meredith,
C.J.

The Malahide Agricultural Society is incorporated under the provisions of the R. S. O. 1877, ch. 35 (the Act in force at the time the will took effect), and is authorized to acquire and hold, but not to take by devise, real estate. The bequest to it is, therefore, so far as it is payable out of the impure personalty, void, and as the assets will not be marshalled in favour of a charity, it can only be satisfied to the extent of the proportion which the pure personalty bears to the whole fund, and the apportionment must be made according to the state and value of the assets at the testator's death: *Hobson v. Blackburn*, 1 Keen 273; *Calvert v. Armitage*, 1 H. & M. 446; Tyssen on Charitable Bequests, 478.

It was further contended that under the terms of the bequest the society was bound to expend annually the interest received by it for the purpose directed by the testator and that the gift over takes effect as to so much of the income as is not so expended. I do not think that it is so. The testator does not say so in express terms, nor, I think, by implication, and I do not see why, assuming the society to be acting in good faith it may not in its discretion apply the money received by it from time to time as it may deem best so long as it does not divert the fund from the purpose to which the testator has directed it to be applied.

I was at first inclined to think that the bequest was invalid as being contrary to public policy, inasmuch as it casts upon a corporation created by the Legislature for the advancement of agriculture the duty of inviting competition for the prizes offered by it so limited into classes as to tend to injure the society and to impair, and perhaps defeat the object for which it had been brought into existence. Conceding that there would be no objection to the condition imposed by the testator if the trustee were a

Judgment.
Meredith,
C.J.

private corporation it is it seems to me an entirely different question where the trustee is a public corporation, treated as this society is, as a branch of the civil government of the Province, and discharging important public duties, and I cannot but think that for such a society to offer its prizes limited as to the competition for them as the testator has sought to limit it, would be highly objectionable in principle and in practice as I have said, calculated to defeat the object for which the society was created by ostracising certain members of the community by reason only of their being also members of associations not only not illegal in their character but recognized by law by the privilege of corporate existence being granted to them.

I am by no means free from doubt upon this point, but I do not think it necessary to determine it because if the provision in question be in that respect contrary to public policy it may, I think, be rejected, being in form a condition subsequent, following a complete gift in trust of the income of the fund for a lawful purpose: *In re Moore, Trafford v. Maconochie*, 39 Ch. D. 116; *Yates v. University College, London*, L. R. 8 Ch. 454; L. R. 7 H. L. 438; *Jarman on Wills*, 5th ed., 853.

The society is, therefore, in my opinion, entitled to be paid the amount of the bequest to it to the extent to which I have declared it to be valid. The gift of the income being a gift of the *corpus* of the fund: *Morrow v. Jenkins*, 6 O. R. 693.

In the view which I have taken it is unnecessary to consider the other questions raised by Mr. Boyd to the validity of the gift over.

The contention with regard to the disposition of the residue was that the purpose for which the testator had directed it to be applied was opposed to Christianity, and therefore illegal, and that the bequest was for that reason void.

I am, I think, bound by *Pringle v. Corporation of Napanee*, 43 U. C. R. 285, to give effect to this contention, and

whatever doubt there may be as to whether if the point there decided were now open for determination the same conclusion would be reached as to which the observations of Coleridge, C. J., in the "*Freethinker*" case, *Regina v. Ramsay*, 15 Cox C. C. 231, as well of recent text writers upon the subject, Tyssen on Charitable Bequests, 113; Jarman on Wills, 5th ed., 169 (note *k*), may be referred to, I am bound to accept that decision as a correct exposition of the law upon the subject with which it deals. There will be judgment declaring the true construction of the will of the testator in accordance with this opinion and for the administration of the estate as prayed, and the costs of all parties—those of the executors to be as between solicitor and client, will be paid out of the residue.

Judgment.
Meredith,
C. J.

G. F. H.

[CHANCERY DIVISION.]

RE COLQUHOUN.

Devolution of Estates Act—R. S. O. ch. 108, sec. 6—Rights of Children of Predeceased Sister of Intestate.

On the death of a person, intestate, leaving no issue, the children of a predeceased sister or brother are not entitled under section 6 of the Devolution of Estates Act, R. S. O. ch. 108, to share in competition with a surviving father, mother, brother or sister of the intestate.

Statement. THIS was a case under the Land Titles Act.

The applicant, who had purchased the interests of the father, mother and surviving sister, in the property of an intestate, claimed it absolutely to the exclusion of the children of a deceased sister of the intestate.

The case was argued in Chambers on January 26, 1895, before MEREDITH, C. J.

J. M. Clark, for the applicant.

A. J. Boyd, for the Official Guardian for the infants.

January 28, 1895. MEREDITH, C. J. :—

Case stated by the Master of Titles under R. S. O. ch. 116, sec. 76 (the Land Titles Act).

The question for decision is as to the effect of section 6 of the Devolution of Estates Act, R. S. O. ch. 108.

Mary Robina Colquhoun died on 2nd February, 1894, intestate, and without issue, leaving her surviving her husband, father, mother and a sister, and also three nieces, infant children of a deceased sister.

The Official Guardian contends that the three nieces are entitled to the same share of the property as their deceased mother would have been entitled to had she survived the intestate; while the applicant contends that they are by the terms of section 6, excluded from any share.

I am of opinion that the contention of the applicant is well founded.

Section 6 reads as follows :

Judgment.

6. When a person shall die without leaving issue, and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother or any brother or sister surviving ; nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister.

Meredith,
C.J.

Sub-section 1 of section 4 provides that all property which is subject to the provisions of sections 4 to 10 (inclusive) shall so far as not disposed of be distributed as personal property not so disposed of is hereafter to be distributed.

Taking these sections together as prescribing the mode of distribution in the cases to which section 6 is applicable I am unable to see how effect can be given to the provisions of the latter section unless it be read as providing that in the cases to which it applies the father, mother, brother and sister surviving the intestate are to share equally, subject, of course, in the case of a married woman, to her husband's rights under section 5, and as making survivorship necessary to entitle any of them to share.

But for section 6, the property being distributable as personal property, the father alone would be entitled according to the provisions of the Statute of Distributions, and section 6 is designed to enable the mother, brother and sister if surviving to share with the father, and does not cut down the father's right further than may be necessary to admit the surviving mother, brother or sister to a share.

I answer, therefore, the question put by the case by saying that under the circumstances stated therein the infant children of the sister of the deceased who predeceased her are not entitled to any share in the lands in question.

G. A. B.

[CHANCERY DIVISION.]

RE OTTAWA MUNICIPAL ELECTION.

BY WARD.

RIDEAU WARD.

Mandamus—County Judge—Municipal Election—Recount of Ballot Papers
—55 Vict. ch. 42, secs. 155, 175 (O.).

A mandamus was refused to compel a County Judge to proceed with a recount where the ballot papers cast at a municipal election were not sealed up as provided by sec. 155 of 55 Vict. ch. 42 (O.).

Statement. THESE were two applications for writs of mandamus to compel the County Judges of the county of Carleton to proceed with recounts of the ballot papers cast for aldermen in two wards of the city of Ottawa at the municipal election held in January, 1895, under the circumstances set out in the judgment.

The applications were argued in Court, held at Ottawa on January 17, 1895, before BOYD, C.

BY WARD.

Ferguson, Q.C., and *Stuart Henderson*, for Gareau, a candidate declared not elected. It may be true the ballot papers were not sealed up in the packages, under sec. 155 of 55 Vict. ch. 42 (O.), but they were enclosed, and the County Judge should have proceeded with the recount, under section 163.

Gorman, for Michael Starrs, one of the candidates declared elected, contra. No writ of mandamus should be granted under the circumstances here, particularly as there is a remedy by *quo warranto*: 55 Vict. ch. 42, secs. 164, 168 (O.); *Re Whitaker and Mason*, 18 O. R. 63; *In re Marter and Gravenhurst*, ib. 243; *In re Centre Wellington Election*, 44 U. C. R. 132; *Re Canada Temperance Act*, 9 O. R.

154; *Chapman v. Rand*, 11 S. C. R. 312; Shortt on Informa- Argument.
tions, Bl. ed., 252.

Ferguson, Q.C., in reply. There was no reasonable doubt as to the identity of the ballots. The applicant should be granted the simple and obvious remedy by a recount, and not be driven to *quo warranto* proceedings: *Re Hamilton and North-Western R. W. Co.*, 39 U. C. R. at p. 110.

RIDEAU WARD.

Chrysler, Q.C., for J. D. Fraser, the applicant. The envelopes furnished to the deputy returning officers were too small, but the ballot papers were otherwise collected in parcels, as required by the statute, and were secured in the ballot box.

Wyld, for Maitelock, one of the candidates declared elected, contra.

January 24, 1895. BOYD, C.:—

These applications are for a mandamus to command the County Judges to proceed with the recount of votes for aldermen in two of the wards at the last municipal election in the city of Ottawa.

Both Judges stopped because, on opening the ballot boxes, it appeared that the various classes of ballots were not put up in separate sealed and authenticated packets, as required by the statute: Con. Mun. Act, 55 Vict. ch. 42, sec. 155 (O.).

It appears to be the clear meaning of the law that there should be some substantial process of sealing and securing the various ballots entrusted to the deputy returning officer and made use of for the purposes of the election. That is seen by comparing section 142 with the later section.

By section 142 it is provided that he shall at the beginning of the poll lock the ballot box and "place his seal upon it in such manner as to prevent its being opened without breaking the seal." In like manner he is directed by section 155

Judgment. to make up the ballots into separate packets, sealed with his
Boyd, C. own seal, etc., and marked upon the outside with a short statement of the contents of such packet, the date of the election, the name of the deputy returning officer and that of the ward or polling sub-division. These packets he is to deliver personally to the clerk of the municipality—apparently not enclosed in the ballot box, though he shall also forthwith return the ballot box to the same clerk: section 155, sub-sec. 3. The statute also provides for a case in which the clerk is to *break open* the package, and thereafter he is to “securely seal up the ballot papers * * into their several packages as before”: *Ib.*, (sub-sec. 5). These “sealed packages” the County Judge is to open upon the recount, in order that he may review the result in so far as regards errors in the count or in the summing up.

Now when the provisions of the statute have been followed the ballot papers come before the County Judges carrying their own authentication, as being those which were sealed up at the close of the first count; for section 166 provides that any indorsement appearing on any package of ballot papers produced by the clerk shall be evidence of such papers being what they are stated to be by the indorsement. But without this, how can the Judges know that the unsealed and unsecured ballots are the same and in the same state and condition as when deposited by the voters? Because no means are given upon the recount by which he can take evidence to shew with what other or equivalent care and custody the ballots have been protected.

The Judges, perhaps, might have a discretion to proceed with the recount, assuming that all is right, as suggested by Hagarty, C.J., in *In re Centre Wellington Election*, 44 U. C. R. 132; but, speaking for myself, I think the better course was to hold their hand, as the plain provisions of the statute had been disregarded. No special harm results from this, except that the summary recount cannot be adopted in the present cases, and the parties complainant

must resort to the usual *quo warranto* remedy, which is expressly preserved by the Act: section 164. Judgment.
Boyd, C.

The applicants cannot invoke the curing clause (section 175), which has reference to provisions of the Act other than those giving the recount. That clause (section 175) formed part of the original Act extending the ballot-voting to municipal elections in 1874: 38 Vict. ch. 28, sec. 38, whereas the provision as to recount is first found in 1883: 46 Vict. ch. 18, sec. 162, and is merely meant to give a limited supervision to the County Judge, but not constituting him a tribunal having cognizance of the election as a whole.

I refuse both applications with costs.

G. A. B.

[CHANCERY DIVISION.]

JOHNSON V. JONES.

Indians—Capacity to Make a Will—Female Indian—43 Vict. ch. 28, secs. 16-20 (D.).—R. S. C. ch. 43.

An Indian male or female may make a will, and may by such will dispose of real or personal property subject to the provisions of the Indian Act, R. S. C. ch. 43, or other statute.

Quære, whether the last part of section 20 of the Indian Act, R. S. C. ch. 43, does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male or female, to the Superintendent-General so that his decision, and not that of the Court should determine such questions.

THIS was an action brought by Jacob Johnson against Peter E. Jones and one Tobicoe for a declaration that the will of one Catherine Keshegoo was void and ineffectual as a testamentary paper, and to have probate of the same revoked, and an account. The facts of the case were sufficiently set out in the statement of claim for the purpose of this report, as follows:—That Catherine Keshegoo, late of the township of Tuscarora, in the county of Brant, widow, deceased, an Indian, and a member of the band Statement.

Statement.

of the Mississaugas of the Credit, was for many years prior to the month of July, 1880, the locatee of the north-east quarter of lot number 3 in the first concession of the township of Tuscarora, in the county of Brant, and in possession thereof; that in or about the month of July, 1880, she sold her right in the said lands to one John Sterling, for the sum of \$400, or thereabouts, for which the latter gave his promissory notes; that on or about the 30th day of August, 1880, the said Catherine Keshegoo made her last will and testament, bequeathing her money and notes to one named James Waub Johnson, and in case of his death before attaining the age of twenty-one years, to his brother William M. Johnson, and died on or about the 14th day of September, 1880, possessed of the said promissory notes and other personal estate; that probate of her will was granted to the defendants by the Surrogate Court of the county of Brant on the 20th day of November, 1880, who received the estate of which the said Catherine Keshegoo died possessed, and which, beside household furniture, amounted to about \$414.44, and converted the same into money, which, with interest thereon at the time of the issue of the writ herein, amounted to \$701.60, or thereabouts; that the plaintiff contended the said Catherine Keshegoo was incompetent to make a valid and effectual will and testament, or a testamentary disposition of her estate, and her said will was invalid and of no effect in law; that the said Catherine Keshegoo died without leaving issue, and the plaintiff was her half-brother and her nearest of kin, and upon her death her estate devolved upon and became the property of the plaintiff, notwithstanding the attempted disposition thereof by will; that the plaintiff had repeatedly demanded from the defendants the estate of the said Catherine Keshegoo, but they had always refused, and still refused, to pay and deliver the same to him, or to account to him for the same; that if the said will was valid and effectual to pass the estate the legatees therein named were dead, and their father, George Johnson, was their nearest next of kin, and he, the said George Johnson,

had assigned the said estate to the plaintiff by indenture of assignment, dated the 31st day of October, 1893. Statement.

The defendants contended that the will was valid.

The action was tried at Cayuga on November 6th, 1894, before ROSE, J. :—

T. A. Snider and *A. T. Thompson*, for the plaintiff.

E. Furlong, for the defendant Jones.

S. F. Washington, for the defendant Tobicoe.

January 10th, 1895. ROSE, J. :—

Had the testatrix any real or personal estate to which, at the time of her death, she was entitled by virtue of the Indian Act, 1880, or otherwise, and which, if not devised, bequeathed or disposed of, would devolve upon her heir-at-law, or upon her executor or administrator? If so, she was as to such property a person who might devise, bequeath or dispose of it by will as provided by R. S. O. 1887, ch. 109, sec. 10, known as the Wills Act of Ontario. The pleadings set out the grounds upon which the plaintiff's claim is made and resisted.

The question must be decided on the proper construction of sections 16 to 20 inclusive of the Indian Act, 1880, 43 Vict. ch. 28, (D.), being the Act in force at the date of the death of the testatrix.

An examination of sections 16 to 19 inclusive, seems to shew that the only right an Indian derives under the statute is a personal right of occupation, subject to the consent or approval of the Superintendent-General of Indian Affairs. The right is spoken of as a location title, and the only right of transfer given is apparently by an act *inter vivos*, and only with the consent or approval of the Superintendent-General, and even if section 19 should be construed to extend to a disposition by will it does not advance the case farther, for the Superintendent-General's consent and approval must be obtained, and signified by

Judgment. his granting a location ticket, without which the devisee
Rose, J. would take nothing.

Nothing is said in these sections 16 to 19 as to any transfer or transmission of title save as I have stated, and therefore no property referred to in such sections would, if not devised, devolve upon an heir-at-law, or upon an executor or administrator, and so it follows that there would be no property obtainable under the provisions of such sections which could be devised.

Section 20 deals with the case of a male Indian dying while holding under a location, and its language, in my opinion, is quite inapplicable to the case of a widow. By one of its provisions if an Indian die leaving no widow, and without issue, the lot of land and his goods and chattels vest "in the Indian nearest akin to the deceased," but this provision is, I think, confined to the case of a male Indian.

The last proviso in section 20 is broad enough in its language to apply to all Indians, male and female. It is "Provided also, that the Superintendent-General shall have power to decide all questions which may arise respecting the distribution amongst those entitled of the land and goods and chattels of a deceased Indian, also to do whatever he may, under the circumstances, think will best give to each claimant his or her share according to the true meaning and spirit of this Act, whether such share be a part of the lands or goods and chattels themselves or be part of the proceeds thereof in case it be thought best to dispose thereof, regard always being had in any such disposition to the restrictions upon the disposition of property in a Reserve." Such provision would seem to contemplate that in such cases the Superintendent-General should be the person to decide disputes, and not the Court. If claimants are entitled to property controlled by the statute then they must submit to such decision as the Superintendent-General may make, and if the statute does not confer on the widow any power of disposition by will nor otherwise direct how her property shall go in the event of her death, then, as to such property as is controlled by the

statute, the Superintendent-General will no doubt determine its disposition according to the meaning and spirit of the Act in cases as nearly alike as may be.

Judgment.

Rose, J.

Section 20 deals with the goods and chattels of a deceased male Indian, as well as the lot he holds under location, but is silent, as I think, with reference to any goods and chattels held by a widow, unless the last proviso extends to such a person.

Certainly there is nothing in the statute to affect the right of an Indian widow to buy or sell goods and chattels, nor is she prohibited from giving them or the money derived from their sale away to whomsoever she pleases. In *Fegan v. McLean*, 29 U. C. R 202. it was held that there was nothing in the statutes then in force to prevent an Indian occupant cutting and selling cordwood from the land occupied by him, and that if it was expedient that there should be such a prohibition it was a subject for legislation.

Part of the estate dealt with by the will in question consisted of the purchase money received by the testatrix for the sale of improvements on a lot transferred by her to the purchaser, in accordance, I suppose, with the provisions of the statute, and also part of household furniture.

There is no provision in the statute controlling the application or disposition of such purchase money.

By section 17 of 43 Vict. ch. 28 (D.), provision is made for compensation for improvements had by an Indian on any land of which he or she is dispossessed, but this is not such a case. Such section, however, recognizes the right of an Indian to receive compensation for improvements in case of a transfer of possession, so that in this case we may assume that the testatrix lawfully obtained the purchase money or compensation for the improvements sold by her.

I have come to the conclusion that an Indian may make a will and may by such will dispose of any lands or goods or chattels, except as far as such right may be interfered with by statute. This, I think, is the fair result of the decisions in *Totten v. Watson*, 15 U. C. R. 392; *Vanvleck*

Judgment. *v. Stewart*, 19 U. C. R. 489; *Fegan v. McLean*, 29 U. C. R. 202, and *Regina ex rel. Gibb v. White*, 5 P. R. 315, in which last case Mr. Dalton clearly states the rights and legal status of an Indian.

Rose, J.

See also as to the right to dispose of property by will: *Ross v. Duncan*, 1 Freeman's Ch. (Miss.) at pp. 598-9. The property here bequeathed was personal property, and there being nothing in the statute in question to restrict or interfere with the widow's right to dispose of the same either by act *inter vivos* or by will, I see no reason why the will made by her was not only valid, but also sufficient to pass the property named in it. I am assuming and not questioning the right of the Dominion Parliament to control the distribution of the goods and chattels belonging to the estate of a deceased Indian, and the power of the Court to consider the question here raised, notwithstanding the granting of probate. As to the former, see recent legislation, 57-58 Vict. ch. 32, sec. 1, and especially as to the case of a widow, sub-sec. 5. As to the jurisdiction of the Court to enter upon this enquiry, R. S. O. [1887], ch. 44, sec. 33.

If, however, the last proviso in section 20 above referred to leaves such disputes as are here raised to the determination of the Superintendent-General so that his decision, and not that of the Court, is to determine such questions, then it may be I have no power to do what is here asked namely, to determine the plaintiff's rights as a claimant.

If I have the power I decide in favour of the will. If I have not the power, then equally the plaintiff fails.

In either event the action must be dismissed with costs. The executors must have their costs out of the fund between solicitor and client as far as they are unable to recover them from the plaintiff.

The law of the United States as to the rights and status of Indians may be found collected in the American and English Encyclopædia of Law, vol. 10, p. 438 *et seq.*

[COMMON PLEAS DIVISION.]

REGINA V. MCGREGOR.

Justice of the Peace—Territorial Jurisdiction—Summary Conviction—Warrant—Evidence—Criminal Code, sec. 889—Costs of Warrant—Criminal Code, secs. 559, 843—Exclusion of Evidence—Criminal Code, sec. 850—Liquor License Act, R. S. O. ch. 194, sec. 112, sub-sec. 2—Sale by Wife—Presumption—Rebuttal—Criminal Code, sec. 113.

Upon a motion for a rule *nisi* to quash a summary conviction of the defendant by a stipendiary magistrate for selling liquor without a license:—*Held*, that although the conviction did not shew on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon *certiorari*, shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore the conviction should not, having regard to sec. 889 of the Criminal Code, 1892, be held invalid.

Regina v. Young, 5 O. R. 184a, distinguished.

Held, also, that, by the combined effect of secs. 559 and 843 of the Code, it was discretionary with the magistrate to issue either a summons or a warrant, as he might deem best; and therefore it was not a valid objection to the conviction that the magistrate included in the costs which the defendant was ordered to pay, the costs of arresting and bringing her before the magistrate under the warrant.

Upon the defendant tendering herself as a witness on her own behalf, the magistrate stated that, in view of the evidence adduced by the prosecutor, a denial by the defendant on oath would not alter his opinion of her guilt, upon which her counsel did not further press for her examination; but her husband was examined, and gave evidence denying the sale of the liquor:—

Held, that there was no denial of the right of the defendant, under sec. 850 of the Code, to make her full answer and defence.

The defendant was a married woman, and the sale of the liquor took place in the presence of her husband; but the evidence shewed that she was the more active party, and she was the occupant of the premises on which the sale took place:—

Held, having regard to R. S. O. ch. 194, sec. 112, sub-sec. 2, that, even if the presumption that the sale was made through the compulsion of the husband had not been removed by sec. 13 of the Code, it would have been rebutted by the circumstances.

Regina v. Williams, 42 U. C. R. 462, distinguished.

MOTION for a rule *nisi* to quash the summary conviction Statement.
of the defendant by the stipendiary magistrate for the
district of Nipissing for selling liquor without a license,
contrary to the provisions of the Liquor License Act.

Judgment. The motion was made before MEREDITH, C. J., and
 Meredith, ROSE, J., on the 16th February, 1895.
 C.J. *Du Vernet*, for the defendant.

March 2, 1895. MEREDITH, C. J. :—

The first objection to be considered is that it does not appear from the conviction or from the evidence that the offence of which the defendant was convicted was committed within the district of Nipissing.

The conviction states that the offence was committed "at her residence near Warren," but there is nothing stated as to where the residence of the defendant or where Warren is situate, and Warren not being one of the municipal or territorial divisions of the Province, we cannot take judicial notice of the fact that it is in the district of Nipissing; and therefore, if we were confined to looking only at the conviction, it must be held bad as not shewing that the offence of which the defendant was convicted was one which the stipendiary magistrate had jurisdiction to try: *Regina v. Young*, 5 O. R. 184a.

Sufficient, however, appears upon the papers returned to bring the case within the provisions of sec. 889 of the Criminal Code, 1892. *

These papers include the warrant for the apprehension of the defendant, which states the complaint to be that the defendant " * * at the township of Dunnet, near Warren, unlawfully did sell, or cause to be sold on her premises * *;" and the heading to the depositions is as follows:

* 889. No conviction or order made by any justice of the peace and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, provided that the court or judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement which, under this Act or other-

"Sep. 6. Magistrate's Court at North Bay, 3 this p.m. Mrs. McGregor appeared charged with unlawfully selling liquor at her house in the township of Dunnet on the 10th August, 1894.

Judgment.
Meredith,
C.J.

The charge having been read over to her she pleaded not guilty."

It may well be that the charge read over to the defendant was the charge as stated in the warrant under which she had been apprehended, and if that be so, it was to that charge that the evidence was directed, and the description of the place where the offence was committed is shewn to be in the township of Dunnet, which we know judicially to be within the district of Nipissing; and sufficient therefore appears to enable us to say that, upon a perusal of the depositions, we are satisfied that an offence of the nature described in the conviction was committed over which the justice had jurisdiction, and that without in any way questioning the correctness of the decision in *Regina v. Young*, already referred to.

It was further objected that the conviction could not be upheld because the stipendiary magistrate included in the costs of the prosecution which the defendant was ordered to pay, the costs of her arrest under the warrant and the bringing her under it before the magistrate, which it was urged was illegal, because, as was contended, a summons and not a warrant should in the first place have been issued.

Assuming that the including of these costs in the costs which the defendant was ordered to pay would, had the warrant been improperly issued, have been a ground for quashing the conviction, as to which we desire to express no opinion, we think the objection fails because of the

wise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant: Provided that the court or judge, where so satisfied as aforesaid, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section 883 conferred upon the court to which an appeal is taken under the provisions of section 879.

Judgment. combined effect of secs. 559 and 843 of the Criminal
Meredith, Code, 1892. * It was discretionary with the magistrate to
C.J. issue either a summons or a warrant as he might deem
best.

It was also objected that the stipendiary magistrate refused to permit the defendant to be examined on her own behalf, and also to permit a full examination of her husband as a witness for her; but it does not appear from the affidavit filed in support of the motion that this objection is well founded.

There was, we think, no such refusal to permit the evidence to be given as was contended for, but at most an expression of opinion of the magistrate that in view of the evidence adduced by the prosecution a denial by the defendant on oath of the charge would not alter his opinion as to her guilt, and after that expression of opinion the counsel who appeared for the defendant did not further press for her examination as a witness on her own behalf; and it also appears that the husband was examined and gave evidence denying the sale of the liquor. It is impossible under these circumstances to say that the stipendiary magistrate refused to hear the evidence, or that there was

* 559. Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons, or warrant, as the case may be, in manner hereinafter mentioned; and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.

843. The provisions of Parts XLIV. and XLV. of this Act relating to compelling the appearance of the accused before the justice receiving an information under section 558, and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this part: Provided that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

a denial of the right of the defendant under sec. 850 of the Code * to make her full answer and defence.

Judgment.

Meredith,
C.J.

The only objection which remains to be considered is that the defendant being a married woman, and the sale of the liquor having taken place in the presence of the husband, it must be presumed to have been made through the compulsion of the latter, and therefore to have entailed no penal consequences upon the wife, and in support of that position *Regina v. Williams*, 42 U. C. R. 462, was relied on.

Even if the law were now the same as it was when *Regina v. Williams* was decided, that case would be no authority in favour of the defendant's contention, because, as Gwynne, J., points out, the presumption invoked in her favour "is removable by proof that the wife was the more active party, even when the offence was committed in the presence of her husband:" p. 463: and that was the case upon the evidence here.

Since *Regina v. Williams* was decided, sec. 83 of the Act then in force, R. S. O. 1877 ch. 181, has been amended by the addition of what is now sub-sec. 2 of sec. 112, R. S. O. 1887 ch. 194, which provides that the person actually selling or otherwise contravening any of the provisions of the Act, who is styled "the actual offender," as well as the occupant of the premises, shall be personally liable to the penalties and punishments prescribed by the Act, and that they may be proceeded against jointly, or that the actual offender may be prosecuted separately, at the option of the prosecutor, but that both of them shall not be convicted of the same offence; and, besides this, the presumption relied on is now entirely swept away by sec. 13 of the Code. †

* 850. The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf.

† 13. No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband.

Judgment. If anything further be necessary to fix the defendant with liability, we think there was evidence that she was the occupant of the premises in which the liquor was sold, and so liable as the occupant: see *Regina v. Campbell*, 8 P. R. 55.

Meredith,
C.J.

All the objections raised therefore fail, and the order *nisi* must be refused.

ROSE, J.:—

I agree.

E. B. B.

[CHANCERY DIVISION.]

RE GRANT.

Life Insurance—R. S. O. ch. 136, sec. 6 (1)—51 Vict. ch. 22, sec. 3—53 Vict. ch. 39, sec. 6—Wives and Children—Policy—Will—Variance—Apportionment.

Under sec. 6 (1) of the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, as amended by 51 Vict. ch. 22, sec. 3, and 53 Vict. ch. 39, sec. 6, the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be, shall be entitled to the insurance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be.

Statement. By a beneficiary certificate issued on the 11th April, 1892, by the Grand Lodge of the Ancient Order of United Workmen to George R. Grant, who designated as beneficiary his wife, Mary Ann Grant, the sum of \$2,000 became payable on his death.

He died on the 19th September, 1894, having first duly made his will, by which he appointed Alexander M. Browne and Jacob H. New executors, who duly proved it.

By his will the testator directed his executors to invest the rest and residue of his estate, both real and personal, in such good and legal securities as they might deem fit, and to pay the interest, dividends, and profits arising

therefrom to his two children Russell and Bessie Grant, Statement.
in equal shares, at such times and in such amounts as they
(the executors) might think advisable until the younger
child became of age, when both were to be paid the prin-
cipal and any profits arising therefrom, in equal shares.
He also directed that the executors, at any time during
the term, should have power to expend the income for the
benefit of the children, instead of paying it directly, and
might also at any time, in their discretion, expend a part
or the whole of the principal for the benefit of the child-
ren, but in no case was any child to receive more than half
of the principal. The will stated that the residue included
the policy on the testator's life in the Ancient Order of
United Workmen, and also another policy, and by the will
he varied the policies so as to make the two children the
beneficiaries instead of his wife.

The sum of \$2,000 having been paid into Court by the
Grand Lodge of the Ancient Order of United Workmen,
the executors applied for an order for payment of it out to
them, claiming to be entitled to it under the will. The
application was opposed by the widow, who claimed to be
entitled to the money under the designation in the benefi-
ciary certificate.

The application was argued before ARMOUR, C.J., in
Chambers, on the 1st February, 1895.

J. J. Warren, for the executors.

Hamilton Cassels, for the widow.

F. W. Harcourt, for the infants.

McKibbon v. Feegan, 21 A. R. 87; *Re Lynn, Lynn*
v. Toronto General Trusts Co., 20 O. R. 475; and *Beam v.*
Beam, 24 O. R. 189, were referred to.

February 12, 1895. ARMOUR, C.J.:—

The question raised turns upon the construction of R. S.
O. ch. 136 sec. 6 (1), as amended by 51 Vict. ch. 22, sec. 3,
and as again amended by 53 Vict. ch. 39, sec. 6, and which

Judgment. now reads as follows : " The insured may by an instrument in writing attached to or indorsed on, or identifying the policy by its number or otherwise, vary a policy or a declaration or an apportionment previously made so as to restrict or extend, transfer or limit the benefits of the policy to the wife alone or the children, or to one or more of them, although the policy is expressed or declared to be for the benefit of the wife and children or of the wife alone, or for the child or children alone, or for the benefit of the wife for life, and of the children after her death, or for the benefit of the wife, and in case of her death during the life of the insured then for the child or children or any of them, or although a prior declaration was so restricted ; and he may also apportion the insurance money among the persons intended to be benefited ; and may, from time to time, by an instrument in writing attached to or indorsed on the policy or referring to the same, alter the apportionment as he deems proper ; he may also, by his will, make or alter the apportionment of the insurance money ; and an apportionment made by his will shall prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the apportionment by the will."

There is in this section a clear distinction drawn between an "instrument in writing" and a "will," and between what the insured may do by an "instrument in writing" and what he may do by his "will ;" and by his "will" he is empowered only to "make or alter the apportionment of the insurance money," that is, he can make an apportionment of the insurance money among those for whose benefit he has effected the policy, or among those for whose benefit he has declared the policy to be, and he can alter any apportionment already made by him ; but this section does not empower him by his will to declare that others than those for whose benefit he has effected the policy, or for whose benefit he has declared the policy to be, shall be entitled to the insurance money, or to apportion it among

others than those for whose benefit he has effected the Judgment.
policy, or for whose benefit he has declared it to be. Armour, C.J.,

I am of the opinion, therefore, that the testator had no power by his will to substitute his children for his wife as the persons for whose benefit the policy should be, and I must, therefore, refuse the application with costs.

E. B. B

[QUEEN'S BENCH DIVISION.]

RE BALL V. BELL.

Prohibition—Division Court—Mortgage—Contract or Obligation to Indemnify Against—Action for Interest only—Dividing Cause of Action—R. S. O. ch. 51, sec. 77.

Where the plaintiff conveyed land to the defendant subject to a mortgage, and after the maturity thereof paid the mortgagee two gales of interest since accrued, which he sought to recover from the defendant by action in a Division Court :—

Held, that the contract or obligation of the defendant to indemnify the plaintiff, as well as the breach thereof, was an entire one ; and there was, therefore, but one cause of action, which the plaintiff had divided, contrary to sec. 77 of the Division Courts Act, R. S. O. ch. 51.

Prohibition granted.

MOTION by the defendant for prohibition to the 10th Statement.
Division Court in the county of York to prohibit further proceedings in a plaint in that Court to recover the amount of two gales of interest paid by the plaintiff under the circumstances set forth in the judgment, upon the ground that by such plaint the plaintiff had divided his cause of action for the purpose of bringing it within the jurisdiction of a Division Court, contrary to sec. 77 of the Division Courts Act, R. S. O. ch. 51.

The motion was argued before ARMOUR, C. J., in Chambers, on the 1st February, 1895.

S. W. McKeown, for the defendant.

N. F. Davidson, for the plaintiff.

In addition to the cases cited in the judgment, *Re Clark v. Barber*, 25 O. R. 253, 26 O. R. 47, was referred to.

Judgment. March 11, 1895. ARMOUR, C. J. :—
Armour, C.J.

The facts, as I find them, are as follows :—

The plaintiff, on the 19th April, 1888, conveyed certain lands to one Jones by way of mortgage for securing the payment of \$900, with interest at seven per cent. per annum, the principal sum on the 19th April, 1893, and the interest at the rate aforesaid half-yearly on the 19th April and the 19th October in each year, as well before as after maturity of the principal, the first payment of interest to be made on the 19th October, 1888.

On the 17th May, 1888, the plaintiff conveyed the said lands to the defendant subject to the said mortgage.

The defendant paid all the interest which fell due upon the said mortgage up to and including the 19th April, 1893.

Some negotiations took place for an extension of the time for the payment of the principal due upon the mortgage and for a reduction of the interest thereon from seven per cent. to six per cent. per annum, but I find that no such extension was in fact agreed upon so as to bind the mortgagee, and the defendant paid the interest which fell due on the 19th October, 1893, at the rate of seven per cent. per annum.

The plaintiff paid the interest which fell due on the 19th days of April and October, 1894, at the rate of six per cent. per annum, and brought suit in the 10th Division Court in the county of York to recover the same, and the defendant now seeks to prohibit the plaintiff from proceeding with the said suit, alleging that this was a division of the plaintiff's cause of action for the purpose of bringing it within the jurisdiction of the Division Court, and was, therefore, a contravention of sec. 77 of the Division Courts Act.

And I am of this opinion.

Whether the conveyance by the plaintiff to the defendant subject to the said mortgage is to be looked upon as creating an implied contract on the part of the

defendant to indemnify the plaintiff against the said mortgage, or to pay the same when it fell due, or as creating an equitable obligation independent of contract upon the defendant to indemnify the plaintiff against the said mortgage, the contract or obligation was an entire one. Judgment. Armour, C.J.

The breach of this contract or obligation was either the not paying this mortgage when it fell due, or the not indemnifying the plaintiff against it, and in either case there was an entire breach.

This contract or obligation and the breach of it constituted one cause of action, which, if enforceable at law, would have, according to the former common law pleading, required but one count in which to set it forth, and under one count all the damages recoverable in respect of the breach of such contract or obligation could have been recovered.

At the time when the plaintiff brought this action in the Division Court he was therefore bringing it for a part only of one cause of action which he had against the defendant.

I refer to *Girling v. Alders*, 1 Vent. 73; 2 Keble 617; *Re Aykroyd*, 1 Ex. 479; *Boyd v. Robinson*, 20 O. R. 404; *Mewburn v. Mackelcan*, 19 A. R. 729.

The motion must be absolute for a prohibition with costs.

E. B. B.

[COMMON PLEAS DIVISION.]

IN RE REID V. GRAHAM BRO'S.

*Prohibition—Division Court Judgment Against Firm in Partnership Name
—Non-service on Partner—Judgment Summons—Committal Order.*

An order for committal under the judgment summons provisions of the Division Court Act is not process of contempt, but is in the nature of execution or limited or qualified execution.

A member of a partnership, against which a judgment has been recovered in a Division Court in the firm name, who has not been personally served with the summons, and has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons.

Judgment of BOYD. C., 25 O. R. 573, reversed on this point and prohibition granted.

Statement. THIS was an appeal from an order of the Chancellor refusing prohibition to the 3rd Division Court of the county of Perth, in respect of certain judgment summons proceedings against Robert S. Graham and John D. Graham, who were described in the summons as trading under the name, style and firm of Graham Bros., taken under section 235 of The Division Courts Act [reported 25 O. R. 573].

In Michaelmas Sittings, December 4th, 1894, before a Divisional Court, composed of MEREDITH, C. J., and MACMAHON, J., *Neville*, supported the motion and referred to Bicknell's and Seager's Division Courts Act, pp. 143, 322; *Ex p. Dakins*, 16 C. B. 77; *Ex p. Young*, 19 Ch. D. 124.

Douglas Armour, contra, referred to *Ex p. Dakins*, 16 C. B. 77; *Fee v. McIlhargey*, 9 P. R. 329; *Re Young v. Parker*, 12 P. R. 646.

December 21st, 1894. MEREDITH, C. J.:—

The action was originally brought in the 3rd Division Court of the county of Middlesex against the partnership firm of Graham Bros., and the summons was served upon the appellant John D. Graham, but not on the other appellant. A notice disputing the plaintiff's claim was

filed, and at the trial judgment was given against the defendants. The notice of dispute contained no admission that the defendant Robert S. Graham was a partner, nor was he adjudged to be a partner.

Judgment.
Meredith,
C.J.

The proceedings were subsequently removed from the 3rd Division Court of Middlesex into the 3rd Division Court of Perth, from which latter Court the judgment summons was issued.

Neither of the appellants attended, as was required by the judgment summons, and an order was made for the committal of Robert S. Graham for twenty days, and of John D. Graham for ten days.

The memorandum of the order in the case of Robert S. Graham is as follows:—"Robert S. Graham, twenty days for non-appearance, not to be enforced if ten dollars per month paid."

The objections of John D. Graham appear fully in the judgment of the learned Chancellor, and it is unnecessary to repeat them or to refer to them further than to say that we concur in the Chancellor's disposition of them.

If we were able to come to the conclusion that the order for the committal of Robert S. Graham was in the nature of process for contempt, we would uphold the order appealed from in its entirety; but we are unable to take that view of it.

In *Ex p. Dakins*, 16 C. B. 77, it was held that an order for committal made under the provisions of the County Courts Act (9 & 10 Vict. c. 95) from which the judgment summons provisions of the Division Courts Act appear to have been taken, was not process for contempt, but in the nature of execution or limited or qualified execution.

The ground upon which this conclusion was based, was that by the 103rd section of the Act the imprisonment did not operate as a satisfaction or extinguishment of the debt, and by section 110, the person imprisoned under it, who should have paid the debt or the instalments yet remaining due at the time of the making of the order, with the

Judgment.
Meredith,
C.J.

costs of the order and all subsequent costs, should be discharged out of custody upon the certificate of payment or satisfaction signed by the clerk of the Court by leave of the Judge of the Court in which the order of imprisonment was made.

The judgment summons provisions of the Division Courts Act, as I have said, appear to have been taken from the English Act, section 235 being the counterpart of section 98, section 240 of section 99, section 247 of section 103, and section 244 of section 110, except that the last mentioned section of the Ontario Act provides for the discharge of the debtor either on payment being made and certified by the clerk, or by leave of the Judge.

In *Henderson v. Dickson*, 19 U. C. R. 592, *Ex p. Dakins* was referred to, the similarity between the judgment summons provisions of the English Act and of the Division Courts Act then in force pointed out, and that case was recognized as correctly laying down the law as to the nature of the process for committal under these two Acts; but it was held that that decision did not apply to an order for committal for not attending in obedience to an order for the examination of a judgment debtor in the Superior Court, because of the absence, in regard to such a case, of such provisions as were contained in secs. 103 and 110 of the English Act, and secs. 165 and 169 of ch. 19 of the Consolidated Statutes of Upper Canada, which latter sections are similar in effect to sections 235 and 244 of the Division Courts Act, and the order for committal in that case was held to be process for contempt.

I refer also upon this point to *Re McLeod v. Emigh*, 12 P. R. 459; *Baby v. Ross*, 14 P. R. 440, at p. 443, and to *Jones v. Macdonald*, 15 P. R. 345.

The provisions of the Division Courts Act, as to actions against partnerships, which are to be found in section 108, must now be considered.

Whatever difficulty there may be as to the nature and effect of a judgment against partners sued in the firm name under the Judicature Act, from which the provisions of the

Division Courts Act dealing with the same subject have been taken, as to which see *Ex p. Young*, 19 Ch. D. 124, and *Davis v. Morris*, 10 Q. B. D. 436, it may, I think, be stated that a judgment recovered against the firm, sued in the firm's name, is a judgment against the members of which the firm is composed, but enforceable, except as to partners who have admitted themselves, or who have been adjudged, to be partners, and partners who have been actually served with the writ and have not appeared, by execution against the property of the partnership only. See observations of Lindley, L. J., in *Western National Bank of the city of New York v. Perez, Triana & Co.*, [1891] 1 Q. B. 304, at p. 314, cited with approval by Fry, L. J., in *Heinemann & Co. v. Hale & Co.*, [1891] 2 Q. B. 83, at p. 91; *Ex p. Ide*, 17 Q. B. D. 755; *Jackson v. Litchfield*, 8 Q. B. D. 474; *Harris v. Beauchamp, Brothers*, [1893] 2 Q. B. 534; *Re Beauchamp Brothers, Ex p. Beauchamp*, [1894] 1 Q. B. 1; *Lovell v. Beauchamp*, [1894] A. C. 607.

Judgment.
Meredith,
C.J.

If such be the effect then of a judgment against a person in the position of the appellant Robert S. Graham, his position may, I think, be likened to that of a married woman against whom judgment has been obtained for a sum of money payable only out of her separate estate.

The case of *Re McLeod v. Emigh*, 12 P. R. 450, in this Court agreeing with *Scott v. Morley*, 20 Q. B. D. 120, decides that the judgment summons provisions of the Division Courts Act are not applicable to a married woman against whom such a judgment has been obtained, though the cases of *Holtby v. Hodgson*, 24 Q. B. D. 103 and *Countess of Aylesford v. Great Western R. W. Co.*, [1892] 2 Q. B. 626, shew that she is a judgment debtor within the meaning of the provisions relating to attachment of debts, but not liable to imprisonment under the judgment summons provision, as was decided in the former of these cases, and as was held, in the latter of them, a judgment debtor who may be examined under the provisions of a rule applying to the English County Courts, which is sub-

Judgment.

Meredith,
C.J.

stantially in the same terms as section 235 of the Division Courts Act, except as to the necessity for an affidavit to which I shall afterwards refer.

I do not differ, therefore, from the view of the Chancellor as to the appellant Robert S. Graham, being a person who might be summoned under section 235 for the purpose of his examination in aid of the execution against the partnership assets, though it is difficult to see of what practical use the power to issue the summons can be if, in the case of non-attendance, the judgment debtor is not subject to punishment for contempt of Court for that non-attendance.

I base my decision solely on the ground that the appellant Robert S. Graham, was not a judgment debtor against whom execution could properly issue, and that the order for the committal was not process for contempt, but in the nature of execution or limited or qualified execution; and that the Judge had therefore no jurisdiction to make it.

We are, I think, bound so to hold, in view of the cases to which I have referred. The reasons for holding that the order for committal is not process for contempt are stronger under our Act than they were under the English Act in the *Dakins* case, for, in addition to the various provisions which are common to both Acts, to which reference has already been made, section 235 of our Act contains a provision not to be found in the English Act, which requires, as a condition precedent to the issuing of the judgment summons, that the plaintiff shall shew, by affidavit, that the "deponent believes that the defendant sought to be examined is able to pay the amount due in respect of the judgment or some part thereof, or that the defendant has rendered himself liable to be committed to gaol under this Act," which points strongly to the purpose of the examination being to enforce payment by the debtor, and, therefore, to obtain process in the nature of execution against him.

In this case it is to be observed that the terms of the memorandum of the Judge shew that the order of com-

mittal was not for contempt, but to enforce payment of the debt, a fact which does not appear to have been brought to the attention of the learned Chancellor.

Judgment.
Meredith,
C.J.

I have not overlooked the decisions under the English Debtors' Act, [1869] 32 & 33 Vict. ch. 62, referred to in the judgment of Charles, J., in *Mitchell v. Simpson*, 23 Q. B. D. 373, at p. 377.

That case is the only one in which the question of the effect of section 5, which is analogous to the judgment summons provisions of the Division Courts Act, arose. It is quite true that as Charles, J. points out, Sir George Jessel in *Marris v. Ingram*, 13 Ch. D. 338, speaks of the imprisonment for which the Act provides as a punishment for misconduct, but the observations of the Master of the Rolls were directed to proceedings not under section 5, but against a defaulting trustee which were by section 4 exempted from the operation of the Act, and he relied on the title of the Act, which is an "Act for the Abolition of Imprisonment for Debt, for the Punishment of Fraudulent Debtors and for Other Purposes," as indicating that the Act was "vindictive in the sense of meaning punishment."

Charles, J., no doubt, thought that the reasoning of the Master of the Rolls was applicable to cases under section 5, and that section was "none the less penal because by payment the debtor can purge his contumacy."

It appears to me, however, that it by no means follows from what was decided in *Marris v. Ingram*, that the conclusion of Charles, J., was the correct one; and this is shewn, I think, by the manner in which the Act is sub-divided, part 2, which contains sections 11 to 23, being headed "punishment of fraudulent debtors." We have here, I think, a plain indication that the debtors with which the preceding sections dealt were not dealt with as fraudulent debtors or by way of punishment. But, however that may be, we are, as I have said, bound by the decisions to which I have referred—decisions upon the Act with which we are dealing—to hold that whatever may be the effect of the Debtors' Act, 1869, the judgment summons sections of the

Judgment. Division Courts Act are not to be construed as providing
Meredith, for the punishment of the debtor, but only means in the
C.J. nature of execution for enforcing payment of a debt.

The appeal of the defendant Robert S. Graham, must, therefore, be allowed ; but as the appeal fails in part and succeeds in part, there will be no costs here or before the Chancellor.

The case is one in which I should not be disposed to give the appellant his costs even had the appeal been entirely successful. There is no merit in his objection ; it is not pretended that he is not, in fact, a partner. He did not choose to attend in obedience to the summons when he might have raised the point which we have decided in his favour, and had he done so, the expense of these appeals might have been avoided.

Our judgment, therefore, is that the appeal of the defendant John D. Graham, be dismissed ; and that the appeal of the defendant Robert S. Graham, be allowed ; and that an order do issue on his application, prohibiting further proceedings against him upon the order for his committal, and that there be no costs here or of the proceedings before the Chancellor.

It may be proper to point out that under the English County Court Rules no such difficulty as has arisen in this case can occur, as those rules provide for the judgment summons issuing against a partner where the judgment is against the firm. See Order 25, Rule 14 *b*, the provisions of which might well be embodied in an amendment of the Division Courts Act.

MACMAHON, J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

HEWITT V. CANE.

*Malicious Prosecution—Record of Acquittal—Necessity for Production of
—Admissions on Examination for Discovery.*

In an action for malicious prosecution, the indictment, with an endorsement thereon of the acquittal of the plaintiff of the criminal charge of which he had been prosecuted, was produced by the clerk of the Court, having been sent to him by the registrar of the Queen's Bench Division to whom the indictment had been returned and which he had been subpoenaed by the plaintiff to produce, the Court being informed that the Attorney-General had refused his *fiat* to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—

Held, that the indictment so endorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, or a copy thereof, could be obtained without a *fiat* of the Attorney-General.

Quere, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery.

THIS was an action for a malicious prosecution, tried Statement.
before BOYD, C., and a jury, at Barrie, on October 30th, 1894, when the plaintiff was nonsuited on the ground that he had not proved the termination of the criminal proceedings.

He had been placed on trial at the preceding Sittings at Bracebridge before the same learned Judge and a jury on the charge of stealing trees and logs, and was acquitted, the learned Chancellor making the following endorsement on the indictment: "I direct verdict of not guilty to be entered after hearing owner and his agent and such evidence as the Crown admitted could not be added to with a view to incriminate.

"11th July, 1894.

J. A. BOYD, C."

The same counsel appeared at both trials, their positions being reversed.

At the trial herein the indictment with the above direction endorsed thereon was produced by the clerk of the Court, having been sent to him by the registrar of the Queen's Bench Division, who had been subpoenaed by the

Statement. plaintiff to produce such verdict, but at the same time the Court was informed that the Attorney-General had refused a *fiat* to the registrar to make up a record of acquittal.

The trial Judge delivered the following judgment: "My ruling in this case is for the purpose of obtaining the opinion of the Court in view of Mr. Lount's admission as to costs, that secondary evidence is not to be given in a case of this kind where the record of judgment may be made up. If the Attorney-General refuses to have the record made up so that it can be exemplified, that is a matter to be put right, I suppose, by mandamus. According to the rule in these cases the record of acquittal in cases of felony is the only admissible evidence. I think the practice rules that way, and in that view I say the case must be withdrawn from the jury in order that the opinion of the Court may be taken on this question."

The plaintiff moved on notice to set aside the judgment entered for the defendant and for a new trial.

In Michaelmas Sittings, November 30th, 1894, before a Divisional Court composed of MEREDITH, C. J., ROSE, and MACMAHON, JJ., *W. Steers*, supported the motion. Assuming, in the first place, that the criminal charge upon which plaintiff had been prosecuted was for a felony, the plaintiff, notwithstanding, sufficiently proved that the prosecution had terminated in his favour. The plaintiff proved this apart from the production of any record of acquittal. The refusal of the Attorney-General to grant his *fiat* authorizing a record of acquittal to be drawn up was proved, and that in consequence no such record could be produced at the trial. The plaintiff, therefore, laid the foundation for the production of secondary evidence, which was produced and duly tendered here. The plaintiff produced the examination of the defendant for discovery before the trial, in which he admitted that the plaintiff had been acquitted of the charge laid in the indictment preferred against him. A defendant can always dispense with proof of any fact by admissions in the pleadings, and

it is his duty to admit all material allegations which are true: Consol. Rules 400, 401; and where admissions are so made, the party making them cannot require, at the trial, proof of facts so admitted: "*The Hardwick*," 9 P. D. 32. Rule 586, expressly provides that any party may at the trial of an action put in evidence any part of the examination of the opposite party. See also Holmsted and Langton's Judicature Acts, page 495. The admissions have the same effect as if made on the pleadings, and when it is essential the pleadings may be amended so as to give effect to the admissions, and the admissions having been made by the defendant without objection, no objection could properly be raised to their reception at the trial: *Regina v. Parry*, 7 C. & P. 836; Roscoe's N. P. Evidence, 16th ed., p. 63; Roscoe's Criminal Evidence, 11th ed., p. 17. It may also be urged that the admissions constituted the best evidence, being the admissions of the party himself. There was also here the production of the original indictment with the endorsement of the acquittal thereon. This was also under the circumstances sufficient evidence of the fact. But in any event it is sufficient. It is laid down that where the original indictment is produced the Court will not enquire how it came before the Court, but being before the Court, it will be received and acted on: *Regina v. Parry*, 7 C. & P. 836; *Lusty v. Magrath*, 6 O. S. 340; *Regina v. Ivy*, 24 C. P. 78; *Legatt v. Tollervey*, 14 East 302; *O'Hara v. Dougherty*, 25 O. R. 347; *Rex v. Smith*, 8 B. & C. 341; *McCann v. Preneveau*, 10 O. R. 573; *Morrison v. Kelly*, 1 Wm. Bl. 385. The criminal charge in this case was, moreover, not a felony, but only a misdemeanour, and the Rule of Charles II. only applies to the cases of felony. The charge here was for stealing growing timber, which was not a felony at common law, and it was only by virtue of legislation on the subject that the offence was constituted a felony: Russell on Crimes, 5th ed., 87; and the effect of sec. 535 of the Criminal Code, whereby the distinction between felonies and misdemeanours is

Argument.

Argument. abolished, and all offences made misdemeanours is to put the offence here in the same position as it originally was.

Lount, Q. C., contra. As regards the admission of the examination for discovery, the examination of a defendant for discovery is looked upon merely as the evidence of a witness in the case, and is no stronger than the evidence of any other witness, so that the fact of the plaintiff's contention would be to dispense with the proof of a record by oral testimony. The Rule of Charles II. is express in its terms, and points out the particular mode in which the termination of the criminal proceeding must be proved, namely, by the production of a properly drawn up record of the acquittal, and this can only be done on the *fiat* of the Attorney-General. Some of the earlier cases raise some doubt, but there is no question now about the necessity for obtaining it. The production of the indictment with the endorsement of acquittal thereon is not the record required by the Rule. The object of the Rule was not to deal merely with the question of evidence; it expressly says that it is passed for the protection of persons who, in good faith, set the criminal law in motion so as to prevent them from being harrassed by having actions brought against them. It is for this reason that the Attorney-General, as the officer of the Crown, looks into the matter and determines in any case in which his *fiat* is asked for whether it is a proper one in which his *fiat* should be granted. The case of *Regina v. Ivy*, 24 C. P. 78, is expressly in point here. The case of *O'Hara v. Dougherty*, 25 O. R. 247, is no authority whatever for the admission of the indictment here. It is in fact an authority in favour of the defendant's contention. That was a case under the Speedy Trials Act, where the County Attorney is required to draw up a record in the form required by the Act, and the record produced at the trial was a record so drawn up, and was therefore a complete record. The criminal charge here was felony and not misdemeanour, and it was so admitted on the pleadings. The Criminal Code does not affect the question at all, it merely abolishes the distinction

between felony and misdemeanour so far as may be necessary for the trial of criminal cases, but it in no way affects the practice in force before the Code took effect; in any event there is no distinction under the Rule of Charles II. as regards felonies and misdemeanours. Argument.

December 21st, 1894. ROSE, J.:—

Two questions arise on the facts as stated:

1. Was the indictment endorsed as it was and produced to the Court good and sufficient evidence of the termination of the prosecution, or was it necessary to have made up and produced a formal record of acquittal?

2. Is the plaintiff bound by the refusal of the Attorney-General to grant a *flat* to the registrar of the Queen's Bench Division to make up a record, or may the Court now properly give such directions to the registrar as will enable the plaintiff to produce such record?

A third question was raised at the trial, to which we will refer later.

If the indictment as produced, without more, shewed that the prosecution had been determined, then, in my opinion, it was good and sufficient evidence of the fact, and should have been received for such purpose.

It will be necessary, to some extent, to review the cases on this question, although most of them may be found referred to in *Regina v. Ivy*, 24 C. P. 78, and *O'Hara v. Dougherty*, 25 O. R. 347.

I have not been able to find when first it was determined that a formal record of acquittal was necessary, nor any case in which was stated the reason therefor, although it is not difficult to suggest a reason.

The rule passed in the reign of King Charles II. (see collection by Sir John Kelyng, p. 3), provided "that no copies of any indictment for felony be given without special order upon motion made in open Court at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the

Judgment. indictments) deterreth people from prosecuting for the
Rose, J. King upon first occasions."

The indictments are here referred to, and no mention is made of a formal record of acquittal.

In the case of *Rex v. Horne Tooke*, 25 St. Tr. pp. 446-7, there was no record made up. The acquittal was at a trial under the same commission as the trial at which the evidence was received. This course was followed in *Rex v. Parry*, 7 C. & P. 836, at p. 839, where the original indictment was received in evidence in support of a plea of *autrefois acquit*. In *Legatt v. Tollervey*, 14 East 302, which was an action of malicious prosecution, the original indictments were tendered in evidence and rejected at the trial, but the Court, Lord Ellenborough, C. J., delivering the judgment of the Court, set aside the nonsuit, holding the original record to be good evidence. That learned Judge said at p. 306: "But if the officer shall, even without authority, have given a copy of record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received."

The record here spoken of was apparently the indictment.

That decision was in 1811. There the indictment had been preferred at the Quarter Sessions for a felony. As early, however, as 1762, in the case of *Morrison v. Kelly*, 1 Wm. Bl. 385, Lord Mansfield presiding, in an action for a malicious prosecution when the indictment was for a misdemeanour, a record of acquittal seems to have been produced, the reference being to the "original record of acquittal." The contest there was as to whether "a copy of the record granted by the Court before which the acquittal was had," was required. The ruling was that that was only necessary in cases of felony. This manifestly referred to the provisions of the rule.

In *Jordan v. Lewis*, 2 Stra. 1122, 13 Geo. 2, "a copy of the indictment and acquittal" was produced.

In *Browne v. Cumming*, 10 B. & C. 70, [1829] the *fiat* given by the Attorney-General was for a copy of the indictment.

In *Rex v. Bowman*, 6 C. & P. 101, [1833] in support of Judgment.
 a plea of *autrefois convict*, the deputy clerk of the peace
 for Middlesex attended at the Old Bailey with the former
 indictment which had endorsed on it the finding of the
 jury at the Clerkenwell Sessions. The Judges ruled that
 it was not receivable, and adjourned the case till the next
 sessions to enable an application to be made to the Court
 of King's Bench for a mandamus requiring the justices of
 Middlesex to make up a perfect record. This was done :
 see *Rex v. Justices of Middlesex, Re Bowman*, 5 B. & Ad.
 1113, and the further history of the case is found at
 p. 337 of 6 C. & P.

In *Rex v. Smith*, 8 B. & C. 341, Lord Tenterden said, at
 p. 343 : " In order to prove the finding of an indictment, it
 has always been the practice to have the record regularly
 drawn up and to produce an examined copy " ; and in that
 case, as well as in *Porter v. Cooper*, 1 C. M. & R. 388, the
 original indictment with the words " true bill endorsed " on
 it was held not to be evidence. This was in 1834.

In *Lusty v. Magrath*, 6 O. S. 340, [1842], an action for a
 malicious prosecution, the plaintiff produced at the trial " a
 record of acquittal made up in the usual form. " There the
 indictment had been found at the Quarter Sessions.

Aston v. Wright, 13 C. P. 14, was also an action for a
 malicious prosecution, the indictment having been at the
 Quarter Sessions. There it was held by the full Court that
 a formal record of acquittal was necessary. *Regina v. Ivy*,
 24 C. P. 78, is, in effect, an authority to the same effect.

It seems too late to question that prior to the Judicature
 Act a formal record of acquittal was necessary according
 to the rules of evidence then acted upon. Did that Act
 work any change ? The argument may be that prior to
 that Act the indictment was not in any sense a record of
 the Court of Queen's Bench or Common Pleas, and to bring
 it within the cognizance of such Courts proceedings by
certiorari were necessary (see *Regina v. Ivy*, at p. 83),
 but that now there is but one Court, the High Court, and
 that all the Judges of such Court have the right to call for

Rose, J.

Judgment.

Rose, J.

and examine all records of such Court : *Regina v. Bunting*, 6 O. R. pp. 125-6. It will be observed that by section 27 Judicature Act, Ontario, the registrar of the Queen's Bench Division is the proper custodian of all indictments. If this argument ought to prevail there would still remain the question whether the production of the indictment with the fact of the acquittal endorsed thereon by the trial Judge necessarily shews that the prosecution has terminated.

By the provisions of the Criminal Code, sub-sec. 3 of sec. 743, "either the prosecutor or the accused" may apply to the Court to reserve a case, and by sub-sec. 2 of sec. 744, the Attorney-General may on notice of motion to the accused or prosecutor apply for leave to appeal, and upon the hearing of an appeal a new trial may be directed, section 746.

From this it would appear that in a proper case, although acquitted, for instance, on an erroneous ruling by the trial Judge, there might be a new trial directed, and on such new trial there might be a conviction.

It would be necessary, therefore, in order to shew that the prosecution was determined, to have evidence that no such proceedings were pending, for if they were, manifestly the prosecution would be pending. This could be shewn as conveniently by a formal record, which would not be made up pending such appeal without shewing the fact, as by any other evidence that might be suggested. Therefore, having regard to the old rule and the reason and convenience of the thing I am not prepared to hold that a new rule should now be established.

Then, has the plaintiff a right to have the record made up without the *fiat* of the Attorney-General? The Judges who passed the order referred to in the time of Charles II. appear to have thought such right existed during the time the Court was in session. That rule was for the Judges only.

In *Rex v. Brangan*, 1 Leach C. C. 27, Willes, C. J., said that by the laws of this realm every prisoner, on his

acquittal, had an undoubted right and title to a copy of the record of such acquittal for any use he might think fit to make of it. This was in 1742, and therefore long after the rule was published. That learned Judge thus seemed to think that the rule was contrary to the law of the realm, even confined as it was, to orders by the Judges.

Judgment.

Rose, J.

In *Rex v. Bowman*, 6 C. & P. 101, the record was wanted to enable the prisoners to plead *autrefois convict*, and the Justices of Middlesex having refused, for the reasons set out in 5 B. & Ad. p. 1115, to make up a record, a rule was obtained calling on them to shew cause why a writ of mandamus should not issue commanding them to make up the record of the conviction of James Bowman at the General Quarter Sessions of the Peace and Sessions of Oyer and Terminer, held in the month of July, 1833, at the Session House for the said county, and to give a copy of such record to the said James Bowman or his attorney. The rule was made absolute.

Counsel did not suggest in argument the necessity of any *fiat* from the Attorney-General, nor was the Attorney-General called upon to shew cause to the rule, nor, apparently, was he given notice of it. Denman, C. J., in giving judgment, said: "The prisoner has a right to have the record of the proceedings which passed at the sessions correctly made up and to make any use of it he can."

But the practice seems to have been to apply to the Attorney-General for a *fiat* once the Court was over: see *Brown v. Cumming*, 10 B. & C. 70, and other cases referred to in *Regina v. Ivy*, 24 C. P. 78, and *O'Hara v. Dougherty*, 25 O. R. 357. By statute, upon the conclusion of the Court, the records were to be sent to some named office for custody: see statute 9 Ed. III., ch. 5, and 11 Hen. IV., ch. 3, referred to in Coke's Institutes, vol. 4, p. 182, and our statutes 14 & 15 Vic. ch. 118, sec. 1, C. S. U. C. ch. 11, sec. 10, and O. J. A., sec. 27.

Whether the last enactment be *ultra* or *intra vires* makes but little difference, for it names as the custodian

Judgment.
[Rose, J.

the registrar of the Queen's Bench Division at Toronto, while the former statutes named the Clerk of the Crown and Pleas of the Court of Queen's Bench at Toronto.

The difference between the control of the record during the sittings of the Court and afterward is thus spoken of in Coke on Littleton, vol. 2, sec. 438, p. 260a: "Of Courts of Record you may read in my reports: but yet during the term wherein any judicial act is done, the record remaineth in the breast of the Judges of the Court and in their remembrance, and therefore the roll is alterable during that term as the Judges shall direct; but when the term is past then the record is in the roll and admitteth no alteration, averment, or proof to the contrary."

It may be that after the criminal records are returned pursuant to the statute to the officer named therein they must be taken to be in the custody of the Crown, and that the Crown acting through its general agent or Attorney-General is the only person competent to give any directions as to the same. If so, then the records are not in the custody of the registrar of the Queen's Bench Division as a record of the High Court, but are in his custody as one named by the Crown by statute, and the control thereafter is in the Crown, and to procure a record to be made up or a copy granted the consent of the Crown or the Attorney-General would be necessary. This was the opinion of the Judges in *Regina v. Ivy*, 24 C. P. 78.

I cannot at present see how the rule passed to govern the proceedings at the Old Bailey affects the question. That was a rule passed by the Judges to regulate and govern their own action, and merely was that while the record or indictment remained in the Court during its session, and before it had been sent out as directed by statute no copy should be given out unless on motion as therein provided, and did not as indeed it could not affect the custody or control of the indictment after it had been sent to the proper officer as directed by statute. The record in such a view would not be in the custody of the Attorney-General, nor of the Court, but of the Crown, and deposited

where directed by the Crown by Act of Parliament or Legislature. Judgment.

Rose, J.

In Blackstone's Commentaries, vol. 2, book 4, 311 (*392), it is said that writs of error to reverse judgments in cases of misdemeanours are not to be allowed, of course, but only on probable cause shewn to the Attorney-General, while writs of error to reverse attainders in capital cases are only allowed *ex gratia*, and not without express warrant under the King's sign manual or at least by the consent of the Attorney-General.

This shews the authority of the Attorney-General, not as from any particular duty assigned to him or any named office to be executed by him, but as acting for and in the name of the Sovereign whose agent general he is: see Stephen's Digest of the Criminal Law of England, pp. 499-501, and judgment of Gwynne, J., in *Regina v. Ivy*, 24 C. P. 78.

If this be the correct theory or principle of decision, then I see no distinction between indictments for misdemeanours and for felonies, except under the Rule regulating the practice in the Old Bailey, which could not control the Crown, and so it would follow that no record of acquittal or copy thereof can be obtained in cases of either misdemeanour or of felony without the *fiat* of the Attorney-General when once the indictment has been sent to the registrar of the Queen's Bench Division; and so the provisions of the Code, abolishing the distinction between felony and misdemeanour, makes nothing for the plaintiff. This is entirely opposed to the law as argued for in *Brown v. Cumming*, 10 B. & C., pp. 71-2, and to the opinion of Willis, C. J., *supra*, but see the observation of Robinson, C. J., in *Lusty v. Magrath*, 6 O. S., at p. 341.

I think it safe to follow the practice which has obtained for so many years and the opinions of Judges in our own Courts of co-ordinate jurisdiction, and to hold that after the indictments have been returned to the registrar of the Queen's Bench Division no record of acquittal or copy thereof can be had without the *fiat* of the Attorney-

Judgment.

Rose, J.

General. The statute of 46 Ed. III, referred to in the quotation made from Lord Coke in *Brown v. Edmunds*, is also referred to in Foster's Crown Law, 3rd ed., p. 229.

I have just been referred by the learned Chief Justice to the case of *Castro v. Murray*, L. R. 10 Ex. 213, where it is held that "It is the duty of the clerk of the petty bag office in the Court of Chancery not to seal a writ of error in cases of misdemeanour until the Attorney-General has issued his *fiat*." The argument is very instructive. The Court said that the fact that the case was a misdemeanour raised a question for the Attorney-General, but that the clerk had no duty to seal the writ until the Attorney-General issued his *fiat*; and the action, which was against the clerk for damages for refusing, was stayed as frivolous and vexatious, and an abuse of the practice of the Court.

This would seem to support the proposition that the distinction made in the rule of Charles II. between felony and misdemeanour does not exist after the record or indictment has been returned to the proper office.

The remaining question is whether the admissions made by the defendant in his examination for discovery afford good and sufficient evidence of the termination of the prosecution.

The argument is that the defendant might have admitted the fact by his statement of defence, and either by himself or his counsel, even if an issue had been raised by the pleadings, might have, by formal admissions at the trial, dispensed with further evidence, and it was argued that it followed that the admission by the defendant under oath, either in the witness box or on examination for discovery, could not be less effective. *Slatterie v. Pooley*, 6 M. & W. 664, was cited as authority for the proposition. In that case it was held that "a parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause."

I need not enter into the discussion nor consider whether the case states anything to the contrary of what was laid down in the prior cases (see Roscoe's N. P. Ev., 16th ed., pp. 62-4), nor whether as applied to such a case as the one before us the better statement of the law is not that of the text in Roscoe, p. 63. "There can be no doubt, however, that such an admission ought in some cases to have no weight; as where * * the admission assumes a degree of knowledge, whether of law or of fact, which the party admitting is not likely to possess; as the construction of a deed of settlement; the contents of a fine or recovery, etc.," for the admissions here fall far short of proving the proceedings set out in the statement of claim or the final determination of the prosecution.

Judgment.

Rose, J.

Questions and answers 216-223 of the examination for discovery were relied upon.

They merely shew that the grand jury brought in a true bill not saying what offence the indictment charged—that "the matter came up in Court after the true bill had been found," that the then defendant was acquitted and was discharged by the Judge.

The information was not laid by the defendant and there was no admission as to its contents. From the other answers read it does not even appear that the defendant was present at the investigation before the justice of the peace.

It would be impossible from this evidence to ascertain the form of the charge, the nature of the proceedings before the magistrate, the form of the indictment or the determination of the prosecution. All that appears is that on an alleged information for some offence some proceedings were had before a justice of the peace, that thereafter certain proceedings were had before a grand jury, on what charge does not appear, and that upon a trial in Court the then defendant was acquitted and discharged.

While it is unnecessary to determine the question now raised, I may say that as far as I have considered it, I am not at all convinced that where what is to be proven is a

Judgment. formal proceeding in Court with a formal determination
Rose, J. thereof involving questions of law and of fact, anything short of a most formal admission, either on the record or in open Court, can dispense with evidence by a record of the proceedings formally made up. It is probable that no party on examination for discovery will possess the knowledge to enable him to make such admission even if statements thus obtained could be received as evidence of the facts to be proved, and so the question will probably not arise for determination.

On the whole, I think the rulings at the trial cannot be interfered with and the motion must be dismissed with costs.

MEREDITH, C. J. :—

I have had an opportunity of reading the very full and elaborate opinion of my brother Rose, and I concur in the result at which he has arrived and his reasons for it, and have only a word or two to add.

I regret that the authorities are such as to compel us to come to the conclusion which he has reached upon a full review of them.

In the case of *Rex v. Brangan*, 1 Leach C. C. 27, referred to by my learned brother, Willes, C. J., is reported to have said that by the laws of the realm every prisoner upon his acquittal had an undoubted right and title to a copy of the record of such acquittal for any use he may think fit to make of it.

This is undoubtedly good sense, but it appears, unfortunately as I think, that it is not now good law also.

As long as the law permits the action for malicious prosecution to be brought I can see no good reason why the plaintiff should not, for the purposes of the action, be entitled, as of right, to a copy of the record of his acquittal. It is incumbent upon him to procure and put it in evidence before his case can be submitted to a jury, and to deny it to him is, in my opinion, an indirect method of say-

ing that he shall not have that which by law he is entitled to—his action against the person who has maliciously and without reasonable or probable cause put the criminal law in motion against him.

Judgment.
Meredith,
C.J.

I desire also to guard myself from any expression of opinion as to the right of a plaintiff in such an action to give in evidence as proof of the termination of the proceedings the admissions of the defendant upon his examination for the purpose of discovery in the action.

MACMAHON, J. :—

I concur in the general result reached by my learned brother Rose. But I wish to guard myself against being considered as assenting to that portion of his judgment holding that where an indictment is produced shewing that the prosecution had been determined, it is evidence properly receivable in an action for malicious prosecution. From that proposition I entirely dissent. The only case which, according to my view, the indictment can be used as proof of the determination of the criminal proceedings is where the bill has been ignored by the grand jury. That I regard as being the rule in England since the case of *Rex v. Smith*, 8 B. & C. 341, followed in this Province in *Regina v. Ivy*, 24 C. P. 78, and *McCann v. Preneveau*, 10 O. R. 573.

G. F. H.

[COMMON PLEAS DIVISION.]

REGINA V. SLATTERY.

Liquor License Act—R. S. O. ch. 194, secs. 50, 108, 112—Keeping Liquor for Sale, etc.—Manager of Club—Liability.

Section 50 of the Liquor License Act, R. S. O. ch. 194, which forbids the keeping or having in any house, etc., any liquors for the purpose of selling by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under Ontario Joint Stock Companies Letters Patent Act who has the charge or control of the liquor merely in his capacity of manager, the act of keeping, etc., being that of the club and not of the manager.

Regina v. Charles, 24 O. R. 432, distinguished.

Statement. THIS was an application to quash a conviction made by the police magistrate of the city of Toronto.

The defendant was, on the 28th February, 1894, convicted by the police magistrate of the city of Toronto, for that he, on the 3rd of February, 1894, at the city of Toronto, unlawfully did keep liquor for the purpose of sale, barter and traffic without the license therefor by law required.

At the trial there was a certificate of the Deputy Provincial Registrar put in, certifying that "The Beaver Athletic Club of Toronto (Limited)," was incorporated under the Ontario Joint Stock Companies Letters Patent Act on the 16th of February, 1893.

The evidence was to the effect that the above-named club had its quarters on Queen street, in the city of Toronto: that there were recreation rooms and a gymnasium in connection with the club: that there was an instructor in gymnastics: and that there were classes in athletics three times a week. One of the rooms in connection with the club was fitted up like an ordinary hotel bar, where there was found by the police officers a large quantity of liquor, beer, ale and porter.

The defendant was employed by the directors of the club as its manager. The members purchased from the manager tickets which were accepted at the bar in payment for drinks supplied, and in the billiard room in payment for games played at the tables.

In Michaelmas Sittings, November 28, 1894, before the Common Pleas Division composed of MEREDITH, C.J., and MACMAHON, J., *DuVernet*, supported the order *nisi*. The conviction cannot be supported. The defendant was merely a salaried officer, namely, the manager, of a club duly incorporated under Ontario Joint Stock Companies Letters Patent Act, R. S. O. ch. 157. The premises in which the liquor was were in the possession and occupation of the club, and so the occupant under the section was the club and not the defendant: *Graff v. Evans*, 8 Q. B. D. 373. Argument.

J. R. Cartwright, Q.C., contra. The defendant was in charge of the premises, and was the occupant within the meaning of the section. The defendant was, however, liable under section 112 of the Liquor License Act. Subsection 2 of that Act provides that the person actually selling or otherwise contravening any of the provisions of the Act as in the section mentioned shall be deemed to be the actual offender and personally liable to the penalties and punishments prescribed by sections 70 and 71. This section was amended by sec. 4 of 56 Vict. ch. 40 (O.), so as to make the penalties and punishments those prescribed by the whole Act, and as having liquor for sale without a license is in contravention of the Act, the defendant came within the terms of the section. *Regina v. Charles*, 24 O. R. 432, is directly in point. There the Court affirmed a similar conviction. In *Regina v. Austin*, 17 O. R. 743, a conviction of the secretary of a club was also affirmed. It was held there, as is the fact also here, that the whole matter was merely a scheme to evade the Act.

DuVernet, in reply. Section 112 only applies to cases where there has been an actual sale, and not to the case of merely being in possession of liquor. Then, as to the contention that the club was merely for the purpose of evading the Act, the evidence shews that it was *bonâ fide* incorporated for gymnastic purposes, and that the possession of the liquor was merely an incident resulting from its principal object.

Judgment. December 21st, 1894. MEREDITH, C. J.:—

Meredith,
C.J.

The conviction can be supported only if the defendant has been guilty of an infraction of section 50 of the Liquor License Act, which forbids the keeping or having in any house, etc., any liquors for the purpose of selling, bartering or trafficking therein by any person unless duly licensed thereto under the provisions of the Act.

The facts of the case were undisputed and were these :— The place where the liquor was kept was in the occupation of the Beaver Athletic Club, a company incorporated under the provisions of the Ontario Joint Stock Companies Letters Patent Act, and whose manager the defendant was ; the liquor belonged to the club, and such charge or control of it as the defendant had was only in his capacity of manager of the club.

Section 108 provides that any house, shop, room or other place in which are found to exist articles or appliances such as were in this case found upon the premises of the club, shall, unless the contrary be shewn, be deemed to be a place in which liquors are kept or had for the purposes of sale under section 50; and it further provides that the occupant of the house, etc., “shall be taken conclusively to be the person who has, or keeps therein, such liquors for sale, barter or traffic therein.”

It is, I think, clear that if these were the only provisions of the Act which deal with the matter, the defendant could not be said to be the person having or keeping the liquor for the purpose of selling, bartering or trafficking therein in contravention of the Act, but that such having or keeping of the liquor was the act of the club; but it was contended, that section 112 renders the defendant liable, and sub-section 2 of that section was relied on to support that contention.

Sub-section 2 provides as follows :—“The person actually selling or otherwise contravening any of the provisions of this Act as in this section mentioned (which, as the section has been amended by 56 Vict. ch. 40, sec. 4 extends

to all the provisions of the Act) is for the purposes hereof styled the actual offender, whether acting on behalf of himself or another, or others, and the actual offender as well as the occupant, shall be liable to the penalties and punishments prescribed by this Act," etc.

This sub-section does not, as it appears to me, extend the liability of a person in the position of the defendant for acts done in contravention of section 50.

By the very terms of the sub-section, the liability created by it is based upon there having been a contravention by the person charged of the provisions of the Act for breach of which he is being prosecuted; and if I am right in holding that the manager of a company who has under his charge, as manager, liquors belonging to the company, which are kept on the company's premises in contravention of section 50, would not, in the absence of the provision of the Act which I am now dealing with, be liable as for an offence under that section, it is, I think, manifest that the provisions of sub-section 2 do not extend that liability.

Apart from these considerations, it is difficult to see how the defendant can be held to be a person who has or keeps liquor in contravention of section 50, when section 108 provides that the occupant of the premises is to be taken conclusively to be the person who does it.

The case of *Regina v. Charles*, 24 O. R. 432, was referred to by Mr. Cartwright as an authority for supporting the conviction; but in that case the club was only nominally in possession of the premises where the liquor was kept, which was, moreover, a place where the club had no right to carry on its business; and, therefore, in that case, the defendant may well have been held to have been the person who kept or had the liquor for sale.

The conviction must, therefore, be quashed; but as the applicant succeeds on a ground not taken before the police magistrate, it must be without costs. There will be the usual order for the protection of the magistrate and the prosecutor.

Judgment.

Meredith,
C.J.

Judgment. MACMAHON, J. :—

MacMahon,
J.

Had it been shewn that the defendant actually sold the liquor, he would have been liable under sec. 112, sub-sec. 2 of the Liquor License Act, for having contravened the provisions of the Act forbidding the sale, barter or traffic of liquor without a license. But the defendant could not be convicted of keeping liquor for sale, etc., as that is an offence under section 108 for which only the "occupant" of the house, shop, etc., can be held liable; and the Beaver Athletic Club being the occupants of the premises where the liquor was found, could have been fined for violating the provisions of section 108 of the Act: *Bowyer v. Percy Supper Club*, [1893] 2 Q. B. 154.

A person may be a caretaker of, and be entrusted with the keys connected with premises where liquors are being kept for sale or barter without license; but it is his master—the occupier of the premises—who alone can be made amenable for an infraction of the law prohibiting such keeping for sale.

Under section 112, at the prosecutor's option, the actual offender—the person selling—may be prosecuted jointly with, or separately from the occupant, although both of them cannot be convicted of the same offence, and the conviction of one shall be a bar to the conviction of the other of them.

In *Regina v. Charles*, 24 O. R. 432, the liquors were in possession of the defendant for the purposes of sale.

The conviction must be quashed, but without costs, and with the usual order of protection to the magistrate and officers.

G. F. H.

[QUEEN'S BENCH DIVISION.]

WYTHE

v.

MANUFACTURERS' ACCIDENT INSURANCE COMPANY.

Contract—Employer's Liability Policy—Condition—Construction—Defence of Actions brought by Employees.

In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefore;"—

Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to shew as a defence or by way of counterclaim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendants' solicitors, a sufficient compliance with the condition.

THIS was an action brought by the plaintiff against the defendants upon an employer's liability policy, to recover certain damages and costs recovered against the plaintiff in an action brought against him by one of his employees named North, for injuries sustained in the course of his employment. Statement.

The defendants set up that the plaintiff had not complied with certain conditions of the policy set out below, by which it was required that in case an action should be brought against the plaintiff, the action should be defended by the solicitors and counsel for the defendants, and that the defence should be under their absolute control.

The action was tried at the Toronto Winter Assizes, on 7th February, 1894, before OSLER, J. A., without a jury.

W. Cassels, Q. C., for the plaintiff.

W. Nesbitt, and *J. H. Denton*, for the defendants.

Judgment. February 13, 1894. OSLER, J. A. :—

Osler,
J.A.

The defendants issued what is called an employer's liability policy, dated 9th May, 1892, whereby, after reciting that the plaintiff had applied to them for indemnity against claims for personal injury caused to workmen in his service, and had agreed to pay them the premium of \$12 therefor for twelve months from the 9th May, 1892, they agreed that, in so far as regards injuries caused during the period covered by the premium, they would pay the plaintiff all sums, up to the limit stated in the schedule indorsed, and full costs of suit, in respect of which the plaintiff should become liable to his employees, or any of them, for injuries received whilst in his service, subject to the conditions of the policy: "Provided always that this policy and the covenant to indemnify herein contained are subject to the conditions and agreements printed herein and indorsed hereon, which are made a part of this contract."

The conditions which the defendants rely upon as constituting, under the circumstances, a defence to the action, are the 5th and 6th, viz.:

"5. Upon the occurrence of an accident, in respect of which it is anticipated that a claim may arise, written notice thereof shall immediately be given by the employer to the head office of the company. The employer, on receiving notice of a claim, shall forward the same to the said company, and at the same time furnish them with the name and address and occupation of the claimant, and the fullest possible particulars of the accident, the nature and extent of the injury, and such further information in relation thereto, on the company's printed forms or otherwise, as the company may from time to time require."

"6. On receiving from the employer notice of any claim, the company may take upon themselves the settlement of the same, and in that case the employer shall give them all necessary information and assistance for the purpose. The employer shall not, except at his own cost, pay or settle any claim without the consent of the company. If any

proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor, and shall indemnify the employer against all the costs and expenses incident upon any such proceedings, whatever may be the result of the same. The employer shall, at the cost of the company, render them every assistance in his power in defending any action or suit which they shall undertake to defend."

Judgment.

Osler,
J.A.

On the 8th June, 1892, one North, a servant of the plaintiff, sustained an injury in the course of his employment, for which, on the 22nd July, 1892, he brought an action against the plaintiff, and afterwards, on the 10th March, 1893, recovered judgment therein for \$340 damages, and costs of suit, which the plaintiff afterwards paid.

Up to within two days of the last mentioned date the only notice the defendants had received from the plaintiff in respect of the accident, was a letter written on the 27th June, 1892, in which he said: "I beg to notify you that a boy in my employ by the name of George North had an accident in which he lost two fingers, on account of which I have reason to believe that there may be a claim. Please send your inspector, and I will give you full particulars." This letter was acknowledged by the defendants on the 28th June, 1892. The inspector followed the letter by a visit to the plaintiff to make inquiries as to the particulars of the accident. This was before action brought, and he was told by the plaintiff that he thought there could be no claim, by reason of the boy's negligence, and the inspector swore that from what he was told he never expected to hear of any action being brought, that is to say, that it was improbable that any proceedings would be taken. From that time until the 8th March the defendants received no further communication from the plaintiff. On that day the plaintiff's solicitor called at the defendants' office, and told them that he was attending to a defence for Wythe in an action brought by North, and

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Osler,
J.A.

asked if he should defend it for the defendants, as he had just found out they were on this policy. This was the day before the commencement of the trial. He also called upon the defendants' general solicitors, and wished them "to take hold of the case." He was told by the latter that they could not undertake to advise in an action at that stage, and there was no pretence that the company had been notified of the issue of the writ. The company on the same day also wrote the plaintiff, pointing out that the conditions 5 and 6 had not been complied with, and that for this reason they could not recognize any liability on their part under the policy.

On the trial before me of the present action the plaintiff contended that these conditions were conditions subsequent, or collateral stipulations, the non-compliance with which did not avoid the policy, but gave rise only to a cross-action or counterclaim for any loss or injury the defendants could shew that they had sustained thereby.

In my opinion these conditions go to the root of the defendants' liability, so far as they relate to what is required to be done by the employer after notice of a claim has been given. The question is one of construction, and it by no means follows that, because the policy is not expressly declared to be void for non-compliance therewith, they are not conditions precedent. Where one condition is expressly buttressed in that manner, and others not, it affords ground for placing the milder construction on the latter, but there is nothing of that kind here. We have, therefore, to ascertain what the object and intention of the parties was from the language they have used.

In the first place, the contract to pay is expressly subject to the conditions, and that is followed by the proviso that the covenant to indemnify is subject to the conditions and agreements which are made a part of the policy. The first part of the 5th condition, which stipulates that a written notice of the occurrence of the accident shall be immediately given by the employer, may be passed over. The part which follows must be read in connection with

the 6th condition. The employer is thereby required, on receiving notice of claim, to forward the same to the company. The object of that is that they may have an opportunity of settling it on as favourable terms as they can obtain, and to deal directly with the claimant. If an action is brought to enforce the claim, it is stipulated that the company shall have the absolute conduct and control of the defence, employing their own solicitor and counsel, etc. They are the parties to pay, and they stipulate naturally and reasonably that they shall manage the defence. Of the benefit of all these important stipulations the defendants have been deprived by the omission of the plaintiff to comply with the conditions subject to which only they agreed to indemnify him. Can it be supposed that it was contemplated by the parties that the only consequence of such an omission, and the defendants' only remedy, would be a cross-action, in which the inquiry would be what damage they had ascertained by loss of the opportunity of settling the action, or of not having managed the defence for themselves? I do not think so. To use the language of Bowen, L. J., in *Barnard v. Faber*, [1893] 1 Q. B. 340, 343, "there can be no adequate protection to underwriters if you relegate them to a cross-action. The (clauses are) intended to protect them against having to pay, not to give them a right to bring an action against the man insuring with them." These are the terms upon which the defendants insure or agree to indemnify the plaintiff, and they are entitled to say in this case, in my opinion, that their liability has not arisen.

The reasons I have given distinguish this case from those relied upon by Mr. Cassels, *Stoneham v. Ocean, etc., Ins. Co.*, 19 Q. B. D. 237, and *Coventry Mutual Live Stock Ins. Ass'n. v. Evans*, 102 Pa. St. R. 281, where conditions requiring notice of accident or loss within a limited time were held not to be conditions precedent to the right to recover on the policy. As Mr. Justice Mathew said in the former case (p. 239), where the question is left at large, it is for the Court to say, looking at all the terms of the

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policy, what the true meaning of the contract is. Here, I think, looking at the form of the contract to pay, the nature of the conditions and their manifest object, the meaning is what I have stated, and not what the plaintiff contends for.

I therefore dismiss the action.

Were I to deal with the case from the other point of view, I should assess the plaintiff's damages at \$200, and disallow the costs of the former action.

The plaintiff moved during the Easter Sittings of the Divisional Court, 1894, to set this judgment aside, and to enter judgment for the plaintiff for the amount recovered in *North v. Wythe*, including costs and his own costs in that action, or for a new trial, upon the ground that the defendants had due notice of the proceedings in *North v. Wythe*, and upon the further ground that the conditions relied on by the defendants were not conditions precedent, but collateral conditions giving the defendants merely a right to a cross-action for damages.

The motion was argued on the 22nd May, 1894, before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

Walter Cassels, Q. C., for the plaintiff. The condition is subsequent, not precedent: *Stoneham v. Ocean, etc., Ins. Co.*, 19 Q. B. D. 237; *London Guarantee Co. v. Fearnley*, 5 App. Cas. 911.

Wallace Nesbitt (with him *J. H. Denton*), for the defendants. The policy incorporates the conditions, and makes them part and parcel of the contract. *Barnard v. Faber*, [1893] 1 Q. B. 340, absolutely covers this case. I refer also to *Caledonian Ins. Co. v. Gilmour*, [1893] A. C. 85, 90, 102.

March 9, 1895. The judgment of the Court was delivered by

STREET, J. :—

In my opinion, it was, under the 6th condition indorsed upon the policy, a condition precedent to the plaintiff's

right to recover, that upon being sued by an employee he should hand over the defence of the action and the right to deal with it to the defendants. I come to the conclusion that this was a condition precedent, not only because that is I think the reasonable meaning to be placed upon the language used, but because of the nature of the risk undertaken, the character of the claims put forward against employers, and the many chances against them in cases which get to a jury. The defendants have a right to stipulate that the conduct of the defence of any action for a claim within the risks insured against shall from its inception be placed in their hands, if they are to be held liable for the result of it, and I think they have done so in terms sufficiently plain in the policy issued to the plaintiff. They agree with the plaintiff that they will pay to him all sums up to the limit in the schedule indorsed, and full costs of suit, if any, in respect of which the plaintiff shall become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "If any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor."

Judgment
Street, J.

I think it would be placing upon the language of the policy and condition a meaning which it was never intended by the parties to bear, if we should hold that the employer may, notwithstanding such a stipulation, in every case, defend an action through his own solicitors and counsel, and then, having lost his case, claim the amount of the adverse judgment from the insurance company, leaving them to shew as a defence or by way of counterclaim that they could have done better by defending it themselves.

In the present case the plaintiff, having been sued by North, handed the writ over to his own solicitor in July, 1892, with instructions to defend the claim for him. On 8th March, 1893, the action was at issue, and was on the peremptory list for trial at the Toronto Assizes for the fol-

Judgment.

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lowing day. Then the solicitor employed by the plaintiff appears to have become aware for the first time of the 6th condition, and he went to the manager of the defendants' company, who then became aware for the first time of the pendency of the action, and referred the solicitor to the solicitors for the company. Those solicitors, upon being asked to "take hold of the case," and being told that it was on the list for the following day, very naturally replied that they could not undertake to prepare or advise upon the case in so short a time, and refused to have anything to do with it. On the same day the defendants' manager wrote to the plaintiff disclaiming all liability by reason of the fact that the plaintiff had not complied with the 6th condition. No further offer was made by either party, and the plaintiff was left to fight out his own battle with his own solicitor and counsel. It is contended that this offer was a sufficient compliance with the 6th condition, but I cannot so view it. The defendants stipulate for the conduct and control of the defence *throughout*. When the offer was made the action was at issue; no time remained for proper preparation for trial by the company's solicitors. Had they taken charge of the case at this period, they must have done so relying entirely upon the preparation made by the solicitors on the record. They had no time to endeavour to obtain a settlement, if they should think one desirable. No suggestion was even made to them that a postponement of the trial might be obtained, even if that would have placed matters in a better shape. In my opinion the refusal of the company's solicitors to have the case "pitchforked" upon them at so late a period was entirely reasonable.

I think, therefore, that the judgment appealed from should not be disturbed, and that the motion should be dismissed with costs.

E. B. B.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE VILLAGE OF LONDON WEST

V.

BARTRAM.

Municipal Corporations — Removal of Clerk — Resolutions therefor — Sufficiency of—Seal.

The removal of a clerk of a municipal corporation may be by a resolution, it not being essential that a by-law should be passed for such purpose.

Vernon v. Corporation of Smith's Falls, 21 O. R. 331, followed.

When the seal of a municipal corporation is wrongfully detained by the clerk of the council a by-law removing him from office may be sealed with another seal *pro hac vice*.

THIS was an action of replevin brought to obtain possession of the books, papers, and seal of the plaintiffs which had been in the custody of the defendant as their clerk. Statement.

The defendant had been removed from his office by resolution of the council; and a by-law was subsequently passed confirming his removal and appointing another person to be clerk in his stead.

The defendant having refused to deliver up the books, papers, and seal after demand made upon him by the authority of the council, this action was brought.

The case was tried without a jury before ARMOUR, C. J., who gave judgment for the plaintiffs.

The defendant moved on notice to set aside the judgment entered for the plaintiffs and to enter the judgment in his favour.

In Michaelmas Sittings, 1894, before a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., the defendant in person supported the motion

E. R. Cameron, for the plaintiffs.

December 5, 1895. MEREDITH, C. J.:—

The contention of the defendant is, that he as clerk was, by force of section 245 of the Consolidated Municipal Act, 1892, the custodian of the property in question: that he could not be removed from his office except by

Judgment. by-law; and that what was called a by-law under the
Meredith, authority of which the plaintiffs assumed to act was no
C.J. by-law, because it was not signed by him as clerk, and the
seal of the corporation was not affixed to it, being in the
possession of the defendant; and that the council could
not, as it assumed to do, adopt a seal *pro hac vice*.

I do not think that section 245 has the effect contended
for; but that the defendant's possession of the property
was merely as the servant of the plaintiffs, and subject to
the direction and control of the council.

Even if a by-law for the removal of the defendant from
his office were necessary, the by-law passed was, as against
the defendant, a valid by-law, and I do not think that he
can be heard to say that it was not properly sealed—
the seal of the corporation having been wrongfully with-
held by him.

The case of *Vernon v. The Corporation of Smith Falls*,
21 O. R. 331, decides that a by-law is not necessary for the
removal of an officer of the corporation, but that a resolu-
tion of the council is sufficient for that purpose; that was
a decision of the Chancery Division, and we should follow
it, and so doing the defendant's contention fails.

The appeal must, therefore, be dismissed with costs.

G. F. H.

[COMMON PLEAS DIVISION.]

RE CORNELIUS F. MURPHY.

Extradition—“False Document”—Uttering of—Conspiracy to Defraud—Cheque—Fictitious Bank Account—Law of Canada—Defective Warrant—Amendment.

In extradition proceedings, it is sufficient if the evidence disclose that the offence under the Extradition Acts is one which, according to the laws of Canada, would justify the committal for trial of the offender had the offence been committed therein, it not being essential to shew that the offence was of the character charged according to the laws of the foreign country where it was alleged to have been committed; and *quære*, whether evidence is admissible to shew what the foreign law is.

In pursuance of a fraudulent conspiracy between the prisoner and his brother, a cheque was drawn by the latter, under a fictitious name, on a bank in which an account had been opened by him in such fictitious name, there being, to the knowledge of the prisoner, no funds to meet it, and which, on the faith of its being a genuine cheque, another bank was induced by the prisoner to cash:—

Held, that the cheque was a “false document,” both at common law and under section 421 of the Criminal Code, 1892, and that there was sufficient evidence to justify the committal of the prisoner for extradition for uttering a forged instrument.

Regina v. Martin, 5 Q. B. D. 34, distinguished.

Where in such proceedings, the warrant of commitment stated that the prisoner had been “committed” for an extraditable offence, instead of his having been “accused” thereof, the fact that the evidence shewed such an offence will not warrant the Court in remanding the prisoner for extradition; but the Court may, if necessary, permit the return to be amended, and for such purpose allow it to be taken off the files and refiled.

THE prisoner was committed by the Judge of the County Court of the county of Wentworth for extradition for forgery committed at Chicago in the State of Illinois, U. S. Statement.

A writ of *habeas corpus* was issued returnable before the Common Pleas Division; and a writ of *certiorari* was also issued to bring up all the papers and proceedings before that Court.

On the return of the writs, the writs and return were filed, and the discharge of the prisoner moved for on the grounds set out in the judgment.

In Michaelmas Sittings, November 23rd, 1894, before the Common Pleas Division composed of MEREDITH, C. J., ROSE and MACMAHON, J. J., *Aylesworth*, Q.C., and *F. Fitz-*

Argument. *gerald*, supported the motion. There is no evidence to shew that the person who opened the account was Frederick Murphy: *Raynor v. German*, 1 F. & F. 700. The evidence entirely fails to establish the identity of the prisoner. There was nothing done here to constitute forgery. The mere assumption of the name of Osborne, did not in itself constitute forgery. The effect of the document did not depend on the assumption of the name, for credit was not given to the name, but to the man, no matter what name he bore. The use of the name must be with intent to defraud: Stephen's Digest of Criminal Law, 4th ed., p. 298, article 356. The mere use of a fictitious name to a note will not of itself constitute a forgery where the credit is given wholly to the person making or endorsing it without any regard to the name or any regard to a third person. This is the rule laid down in 1 Leach, C. C. 59, and followed in *Regina v. Martin*, 5 Q. B. D. 34. A man may go to Australia, or some foreign country, and, apart from any intention to defraud, as for instance, to prevent his whereabouts being known to his family, may use an assumed name. This of itself would not render him guilty of forgery. If Murphy had used his own name, this, of course, would not be forgery, and can therefore his using the name of Osborne without anything else being done, be evidence of the offence. Section 421 of the Criminal Code does not interfere with the rule so laid down; and section 422 does not apply because if there is no forgery, there can be no uttering. *In re Sherman*, 19 O. R. 315, the mere use by the prisoner of the name of S. & Co., was held not to constitute forgery. The next point is that to constitute the crime of forgery within the Extradition Acts, there must be forgery according to the law of the place where the offence was committed. Here there is no evidence to shew that there was any forgery committed according to the law of the State of Illinois, and in fact, according to the law of that State, no forgery was committed. In *In re Bellencontre*, [1891] 2 Q. B. 122, it is laid down that in

order to justify the extradition of the subject of a forgery, there must be evidence of an act committed by him in the foreign country amounting to an offence against the law of such country, and which if committed in England, would amount to an offence against English law : see also *Re Phipps*, 8 A. R. 77; *Regina v. Lavaudier*, 15 Cox C. C. 329; *Re Windsor*, 6 B. & S. 522, 528; Moore on Extradition, 648. The defendant also being a British subject is not liable to extradition: Article in 64 L. T. Journal and Record, p. 130. The warrant of commitment is also defective as it states that the person had been convicted, while the evidence shews that he had only been accused of the alleged offence: *Re Asher Warner*, 1 U. C. L. J. N. S. 16. There is no power to amend the warrant after the return to the *certiorari*: *Regina v. MacKenzie*, 6 O. R. 165. Argument.

Bruce, Q.C., and *Crerar*, Q.C., contra. With regard to the last point raised, there is no difficulty arising from the use of the word "convicted" instead of "accused." The material question is, does the evidence disclose an offence for which the defendant can be extradited. If it does, the Court can remand the prisoner for extradition. The evidence is the substance, the statement in the warrant is merely a matter of form. Here the evidence clearly discloses an offence which renders the defendant liable to extradition. There was here, however, a supplementary return made by the gaoler and both these returns are before the Court, and the Court can act on the later return. The Court has also the power to allow the return to be amended, so as to have the proper warrant set up. The prisoner is being held on the new warrant, and nothing would be gained by his discharge for any defect in the first warrant, as he would be immediately brought up on the new warrant: *Re Martin*, 4 U. C. L. J. N. S. 199, 200; *Re Parker*, 19 O. R. 612; *Re Smith*, 3 H. & N. 227; *Re Swire*, 30 Ch. D. 239; *Re Anderson*, 20 U. C. R. 124, 11 C. P. 9, at pp. 65, 68. The fact of the defendant being a British subject is no answer to proceedings for extradition.

Argument. This is laid down in *Re Burley*, 1 U. C. L. J. N. S. 34, where it is said that the Act extends to British subjects committing the offence named in the treaty in the territory of the United States, and then becoming fugitives to Canada. It is not necessary to prove the foreign law, all that the Acts require is that the offence should be forgery according to the law of this country: *Re Smith*, 4 P. R. 215; *Regina v. Hovey*, 8 P. R. 345; *Re Caldwell*, 5 P. R. 217; *Re Burley*, 1 U. C. L. J. N. S. at p. 45; *Regina v. Morton*, 19 C. P. 9, 25; Moore on Extradition, p. 646, sec. 429; *Re Phipps*, 1 O. R. 586, 8 A. R. 77; Act of 1890, article 1. The evidence returned clearly disclosed the offence of forgery. It shews that the name of Osborne was a fictitious name, and that it was used with the intent to defraud. This is all that is necessary to constitute the charge of forgery, and distinguishes the case from *Regina v. Martin*, 5 Q. B. D. 34. There was clear evidence of the identity of the prisoner.

December 5th, 1894. MEREDITH, C. J.:—

The prisoner has been under the provisions of the Extradition Act committed by the Judge of the County Court of the county of Wentworth for the extradition crime of uttering a forged instrument, the forged instrument being a cheque purporting to be drawn by Robert Osborne on the Bank of Commerce of Chicago for \$1,350.

It is objected for the prisoner on the motion for his discharge—

1. That in the warrant of commitment the ground of the determination of the Judge is stated to be that the prisoner had been “convicted,” while the evidence shews that he had not been convicted, but only “accused” of the extradition crime.

2. That no evidence was given to shew that the offence with which the prisoner is charged amounts to uttering a forged instrument according to the law of the State of Illinois, in which State the offence is alleged to have been committed; but the contrary is shewn.

3. That the evidence did not disclose the commission by the prisoner of the extradition crime of which he is accused.

Judgment,
Meredith,
C.J.

I am of opinion that none of these objections ought to prevail.

The first objection is a purely formal one, and we ought not to give effect to it unless it appears clearly that we are bound to do so according to law and the practice of the Court.

I do not think that if the warrant of commitment be defective we can in such a case as this look at the depositions returned, and if we find from them that an extradition crime has been committed remand the prisoner, as was done by the Court of Queen's Bench in *Re Anderson*, 20 U. C. R. 124.

The power of the Court to do this was fully considered by the Court of Common Pleas in the case of the same prisoner: *Re Anderson*, 11 C. P. 9; and the decision was against the existence of such a power.

The Court of Queen's Bench had in the case before it assumed to exercise the power of remanding, but it was pointed out by the Court of Common Pleas that in doing so it had acted upon a rule, which though applicable to cases where the Court was acting with reference to a crime committed in the Province, and therefore by reason of its jurisdiction as a Court over the offence it had inherent power to remand, was not applicable to the case of a commitment for extradition, because in such a case there was no jurisdiction over the individual, except such as was given by the Act of Parliament, and the warrant was the only authority for the detention of the prisoner.

There is, however, in my opinion, no doubt that the Court has power to permit the return to the writ to be amended, and to allow it to be taken off the files in order that the amendment may be made: *Leonard Watson's Case*, 9 A. & E. 731; *Regina v. Reno and Anderson*, 4 P. R. 281; and if in this case the supplementary return made by the gaoler is not properly before us we should now give leave

Judgment.
Meredith,
C.J.

to take the return off the files in order that it may be amended by returning the second warrant, to which I shall afterwards refer, as one of the causes of the prisoner's detention.

I do not think, however, that any amendment of the return is necessary.

The gaoler has returned the original warrant of commitment, and by a supplementary return a second warrant proper in form, and both of these returns were before the Court when the motion for the discharge of the prisoner was made.

The proper practice on the return of a writ of *habeas corpus* appears to be to bring into Court and read the return, whereupon, and not before, it is to be filed by the proper officer: *Re Reno and Anderson*, 4 P. R. 281, at p. 291.

If that practice had been followed here the writ, with the return and the supplementary return, would have been brought into Court and read together, and we must, I think, deal with this case as if that had been done; and I can see no reason, therefore, why the return and the supplementary return may not be treated as one, and as the return to the writ.

The first objection, therefore, in my opinion, cannot be sustained.

It will be more convenient to consider the third objection before dealing with the second.

The question raised by the third objection is substantially this—Was the evidence produced as the 11th section of the Act requires, such as would according to the law of Canada, subject to the provisions of the Act, have justified the committal of the prisoner for trial if the crime had been committed in Canada?

There was, in my opinion, evidence to go to a jury to support the following conclusions of fact:

1. That the prisoner on the 19th September, 1894, obtained from the First National Bank of Chicago \$1,350, upon a cheque for that amount purporting to have been

drawn by Robert Osborne on the Bank of Commerce of Chicago payable to the prisoner's order.

Judgment.

Meredith,
C.J.

2. That no such person as Robert Osborne had any existence in fact, and that this was known to the prisoner.

3. That there were to the knowledge of the prisoner no funds to meet the cheque, and that his purpose in negotiating it was to defraud the First National Bank of Chicago.

4. That the cheque was signed by Frederick Murphy, a brother of the prisoner, with the name of Robert Osborne, he knowing of the fraudulent use to which it was intended to put it, and for the purpose of carrying out the fraud.

5. That the making and negotiating of the cheque were the result of a fraudulent conspiracy entered into between the prisoner and his brother Frederick, in pursuance of which the brother opened an account with the Bank of Commerce in the name of Robert Osborne, and that at the time he assumed the false name he did so to the knowledge of the prisoner for the purpose of carrying out the fraud which was ultimately perpetrated upon the First National Bank, or some fraud of a like nature.

6. That the Bank of Commerce was induced by the representations of the prisoner to believe, and did believe, that the person with whom the account with them was opened was known to the prisoner; that his real name was Robert Osborne, and that he had been well and favourably known to the prisoner in Toronto, the last two of which statements were untrue.

7. That the payments and withdrawals from the Bank of Commerce in connection with the Robert Osborne account were made to appear to be the result of real transactions between Osborne and other persons, but were, in fact, fictitious transactions, and that this was done in furtherance of the fraudulent scheme, and to enable the parties more surely to accomplish their fraudulent purpose.

I do not say that these conclusions must necessarily be drawn from the facts proved, but it is sufficient for the

Judgment.
Meredith,
C.J.

purposes of the present inquiry that a jury on the trial of the prisoner may draw them.

The next question is—Such evidence having been given does it justify the committal of the prisoner for the “extradition crime” with which he is charged, viz., uttering a forged instrument? and I have no doubt that it does.

Section 422 of the Criminal Code, 1892, defines “forgery” to be the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one, whether within Canada or not, or that some person should be induced by the belief that it is genuine to do or refrain from doing anything whether within Canada or not.

Section 421 declares that the expression “false document” means (a) a document the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of the person who purports to make it, is falsely dated as to time or place of making where either is material; (b) a document the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist.

This section contains other sub-heads of definition, which it is not necessary to refer to.

Section 424 is the section which deals with the crime of uttering forged documents; and it provides that any one who, knowing a document to be forged, uses, deals with, or acts upon it, or attempts to use, deal with, or act upon it, or causes or attempts to cause any person to use, deal with, or act upon it as if it were genuine, shall be guilty of an indictable offence, and be liable to the same punishment as if he had forged the document.

Applying the provisions of these sections then to the evidence it would seem to be clear that if the cheque be a “false document” “the extradition crime” charged is made out.

It was urged on behalf of the prisoner that the alleged

incriminating act did not amount to uttering a forged instrument, because, as was said, the account in the Bank of Commerce was a real account, and the prisoner's brother had, for the purpose of keeping it, the right to assume and use the name of Robert Osborne or any other name he chose to adopt; and because the First National Bank did not know Robert Osborne or give credit with regard to the name or any relation to a third person; and for this position, *Regina v. Martin*, 5 Q. B. D. 34, was cited.

Judgment.
Meredith,
C.J.

The *Martin Case* is, it appears to me, clearly distinguishable. There the reserved case shews that the prisoner in drawing and delivering the cheque to the prosecutor did not do so in the name of or as representing any other person real or fictitious; the cheque was drawn and uttered as his own, and it was received by the prosecutor to whom the prisoner was well known, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert, his true Christian name. He would equally have got credit had he signed his proper name; the credit was given to the prisoner himself, and not to the name in which the cheque was signed; the cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of William Martin, as distinguished from Robert Martin, or of any other person than the prisoner.

The facts of the present case are entirely different. The cheque was not signed in the presence of the officials of the bank; it was passed off, and they accepted it as the cheque of Robert Osborne; and a jury, on the trial of the prisoner may upon the evidence find that the bank gave credit relying upon the cheque being what it purports to be, the cheque of Robert Osborne; and the facts would, as I have said, also warrant a finding that the name of Osborne was assumed for the purpose of perpetrating the fraud, which was practiced upon the First National Bank.

In *Rex v. Peacock*, 1 R. & R. 278, the Judges were of opinion that where the prisoner is proved to have

Judgment. assumed a false name for the purpose of a pecuniary fraud
Meredith, connected with the forgery, drawing, accepting or endorsing
C.J. in such false or assumed name is forgery.

In *Rex v. Sheppard*, 1 Leach C. C. 226, the facts were that the prisoner had given in payment for goods bought by him a cheque signed with the name of H. Turner. It appeared that no person of the name of H. Turner kept cash at the banking house on which the cheque was drawn, or lived at the address given by the prisoner. The prisoner was found guilty, but execution was respited on a doubt whether, as the prosecutor had sworn that he gave credit to the prisoner and not to the cheque, he was guilty of forgery. The twelve Judges were unanimously of opinion that the conviction was legal, for it was a false instrument, not drawn by such a person as it purported to be drawn by, and the using of the prisoner's name was only for the purpose of deceiving.

To the same effect are the cases of *Rex v. Marshall*, R. & R. 76 ; *Rex v. Wilely*, *ib.* 90, and *Rex v. Francis*, *ib.* 209.

The provisions of the Criminal Code, 1892, to which I have referred, seem to require, in order to constitute the crime of forgery, even less to be shewn than these cases would render necessary, and the instrument in question here is, in my opinion, a false document within the meaning of section 421, as well as a false document at common law.

Coming then to the third and only remaining objection, the contention on behalf of the prisoner is, that before his committal could properly have been ordered, it was incumbent on the prosecution to establish by evidence that the offence of which he was accused was "uttering a forged instrument" according to the law of the State of Illinois; and that, even if that were not necessary the evidence given on his behalf shewed that the offence was not made out according to the law of that State.

In none of the cases in which the question of the construction of the Extradition Act has been under consideration has the precise point which we are called upon to

decide been determined, though in most of them expressions were made use of in the judgments which would appear to indicate that it was the opinion of the learned Judges, who gave utterance to them, that it was necessary in order to justify a committal for an extradition crime to establish by evidence that by the law of the country in which the offence is alleged to have been committed the facts proved constituted the crime charged.

Judgment.
Meredith,
C.J.

In the *Anderson Cases*, to which reference has already been made, the contention was that, although the offence charged was murder according to the law of the State of Missouri in which the extradition crime was alleged to have been committed, it was not murder according to the law of Canada, because the killing was done in an endeavour to escape from slavery, and would not therefore, had the act been done in Canada, have amounted to murder.

The Court of Queen's Bench declined to give effect to this contention, and remanded the prisoner for extradition.

It will be seen, therefore, that it was not necessary for the determination of that case to decide the question we have to deal with, and it was not passed upon by the Court of Queen's Bench; and, as has been pointed out by a writer on the subject of extradition, Clarke on Extradition, 3rd ed., p. 217 (*n*), the killing, in the case under consideration by the Court of Queen's Bench, was murder, according to the law of Canada, unless the circumstances under which it took place were such as to justify or excuse the act, which was a question for the consideration of the Court in which the trial of the prisoner might ultimately take place.

In *Re Phipps*, 1 O. R. 586, 8 A. R. 77, the question was whether the acts charged constituted, according to the law of Canada, the crime of forgery. The Court of first instance thought that they did, and its decision was upheld by the Court of Appeal.

It was there contended that even if forgery, according to the law of Canada, or forgery in the sense of which that crime was understood and dealt with by the Courts of

Judgment. Great Britain and the United States, was not proved to
Meredith, have been committed, yet as the acts proved amounted to
C.J. forgery, according to a statute of the State of Pennsylvania,
where they were committed, an extradition crime had been
made out, but it became, because of the view which the
Court took, unnecessary to determine that question.

In the case of *Re Hall*, 8 A. R. 31, a similar question to that raised in the *Phipps' Case* was under consideration; and the result was the same as in that case.

In the *Windsor Case*, 6 B. & S. 522, it was held that the crime for which the prisoner was sought to be extradited was not forgery according to the law of England, and although it had been declared by a statute of the State of New York, where the offence was committed, to be forgery, it was not the extradition crime of forgery with which the Ashburton Treaty deals.

In each of the Canadian cases opinions were expressed as to the necessity of shewing that the acts charged constituted an extradition crime, according to the law of the country, by which extradition of the prisoner was demanded.

In the *Phipps' Case*, 1 O. R. at p. 610, Mr. Justice Armour's view of the treaty was that there were two questions to be determined. (1) Whether the offence charged was in the nature of forgery. (2) Whether it was forgery by the law of the country in which it was committed.

And opinions to the like effect were certainly expressed by others of the Judges in that and the other cases, as well as by Cave, J., and Wills, J., in the *Bellencontre Case*, [1891] 2 Q. B. 122.

Contrary opinions were, however, expressed by Patterson, J. A., in the *Phipps' Case*, at p. 117, and by Dorion, C. J., in the *Worm's Case*, 22 L. C. Jurist 109.

We are, as I have said, under these circumstances called upon to decide the point, incidentally referred to, but not decided in the cases I have mentioned, but now necessary for the decision of this case.

Looking then at the provisions of the statute, which we have to construe, was proof of the foreign law necessary

to the making out of the extradition crime, for which the Judgment.
surrender of the prisoner is demanded.

Meredith,
C.J.

I am of opinion that it was not.

The 2nd section (sub-section *b*) declares the expression "extradition crime" to mean any crime, which if committed in Canada or within the jurisdiction of Canada would, if within the terms of the treaty, be one of the crimes described in the first schedule to the Act.

Number four of the crimes in this schedule is forgery, counterfeiting, or altering or uttering what is forged, counterfeited or altered.

Section 6 provides for the apprehension of a fugitive on "such evidence or after such proceedings as would, in the opinion of the Judge, justify the issue of his warrant, if the crime of which the fugitive is accused or alleged to have been convicted had been committed in Canada."

Section 11 provides that "if in the case of a fugitive accused of an extradition crime such evidence is produced as would according to the law of Canada, subject to the provisions of this Act, justify his committal for trial if the crime had been committed in Canada the Judge shall issue his warrant," etc.

And section 24 provides that the list of crimes in the first schedule is to be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of the Act, and as including only such crimes of the description in the Act as are under that law indictable offences.

Having regard to the provisions of these sections, I am of opinion that, so soon as it is established by evidence sufficient for that purpose that a state of facts exists, which, had it existed in Canada, would justify the committal of the fugitive for trial for the offence charged, if it be one of the offences mentioned in the treaty with the foreign country by which the extradition is sought and one of the crimes enumerated in the schedule, the duty to commit under section 11 arises, and it is unnecessary to prove the

Judgment. foreign law in order to shew that by that law the fugitive
Meredith, has committed the extradition crime of which he is accused.
C.J.

Holding then, as I do, that proof of the foreign law was unnecessary, is the prisoner entitled to his discharge on the ground that proof of the foreign law was relevant to the inquiry, and that the evidence adduced on his behalf as to the foreign law established that his offence was not an extradition crime within the meaning of the treaty?

The learned County Court Judge was of opinion that such evidence was irrelevant and therefore inadmissible, though, notwithstanding his ruling to that effect, the evidence of Mr. Mahony as to the law of Illinois was received.

Section 9 of the Act requires the extradition Judge "to receive any evidence tendered to shew that the crime of which the fugitive is accused or alleged to have been convicted, is an offence of a political character or is for any other reasons not an extradition crime."

It is difficult to see what evidence is referred to as evidence to shew that the crime is for any other reason not an extradition crime, unless it be such evidence as was held to be inadmissible in this case; and Mr. Justice Armour in the *Phipps' Case*, p. 611, expressed the opinion that the fugitive was entitled to give and that the Judge was bound to receive such evidence. On the other hand, if the interpretation clause is referred to, "extradition crime" is found, as I have already pointed out, to mean a crime which, if committed in Canada or within Canadian jurisdiction, would be one of the crimes described in the first schedule to the Act, which seems to exclude all reference to the foreign law for the purpose of ascertaining whether an extradition crime had been committed; and a practical difficulty would certainly arise from the admission of such evidence if the view of a former Chief Justice of Ontario (Spragge) be correct, that "it is incumbent on the Court to see that the act charged constituted an extradition offence, and, unless it is established as a matter of law that it is so, the accused ought not to be surrendered;" (*Re Hall*, 8 A. R., at p. 10), as that would

render it necessary for the Court to inquire into and finally determine, perhaps upon conflicting evidence, the question as to what the foreign law is.

Judgment.
Meredith,
C.J.

It is, however, in the view I take of the evidence unnecessary in this case to decide that question.

All that was shewn by the evidence of Mr. Mahony was that by the law of Illinois, "if a man were to utter or pass a cheque drawn by another person under a non-existing name, but on a bank in which he was keeping an account," that would not be forgery.

That evidence, it is hardly necessary to point out, falls far short of proving that the prisoner upon the facts of this case might not, according to the law of Illinois, be properly convicted of the offence with which he is charged; and there is, therefore, no evidence to shew that the foreign law differs in any respect from our law as to the nature of the offence of which the prisoner has been guilty, if upon his trial the facts are found in accordance with the *prima facie* made out, by the tribunal which has ultimately to pass upon the question of his guilt: see also *Wideman's Case*, referred to in Clarke on Extradition, 3rd ed., pp. 151, 152.

All the objections, therefore, fail, and the prisoner must be remanded.

ROSE and MACMAHON, JJ., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

CAPON V. THE CORPORATION OF THE CITY OF TORONTO.

Assessment and Taxes—Local Improvement Rate—Improper Charge on Land—Municipal Act R. S. O. ch. 184, secs. 612, 623—Assessment Act R. S. O. ch. 193, sec. 119; 55 Vict. ch. 48, sec. 119 (O.).

Where under a local improvement by-law an assessment is made of the lands benefited and chargeable with the cost of the improvement, and lands having a specified street frontage are thereafter charged with a specific amount of the cost of the improvement which is entered on the assessment and collectors' rolls, and such lands are subsequently subdivided, the whole rate cannot legally be charged against a portion of the lands so subdivided.

The duty of the clerk of the municipality is to bracket on the roll the different subdivisions with the name of the persons assessed for each parcel and the annual sum charged against the original parcel as that for which the sub-lots and persons assessed for them are liable under the special rate.

Statement. THIS was an action tried before STREET, J., at the Toronto non-jury sittings, in September, 1894, when the following statement of the facts was agreed on:—

1. Lindsey avenue is the first street north of College street, in the city of Toronto, running eastward from Dufferin street, and before 1889 Gladstone avenue ran north from Dundas street to a point about 470 feet south of College street, next east of Dufferin street, and did not extend north of College street.

2. In 1889 Ann Stuckey was assessed as owner of lots 71, 72 and 73 on the north side of Lindsey avenue, as shewn on plan 324, each of said lots having a frontage of 30 feet on Lindsey avenue by a depth of 130 feet.

3. By by-law 2415 of the city of Toronto, passed November 11th, 1889, the defendants expropriated lot 73 and the easterly 6 feet of lot 72 on plan 324 in order to extend Gladstone avenue northward, and Ann Stuckey was paid for this land.

4. By deed dated November 8th, 1889, and registered on the 3rd of January, 1890, John Stevenson became the owner of the remainder of these lots.

5. On February 2nd, 1891, the city passed by-law 2841 Statement.
to assess the cost of this extension upon the abutting properties.

6. This by-law was passed under the provisions of a general by-law, No. 2439, printed in the Consolidated By-laws of the city of Toronto, at pages 61 *et seq.*

7. Section 28 of the said by-law 2439 requires the assessment commissioner to "make the necessary special assessment on the property immediately benefited," etc., and pursuant thereto the assessment commissioner prepared the document, a copy of which is put in assessing John Stevenson's 90 feet at \$62.37 annually as its share of the cost of the said street extension.

8. In the assessment roll for 1891, under assessment No. 4582, appears the name of John Stevenson as owner of 24 by 90 feet at the corner of Gladstone avenue and Lindsey avenue, and in the local improvement roll for that year, prepared by the assessment commissioner, Stevenson is assessed for the extension of Gladstone avenue under the same assessment number (4582) (in pencil) for \$62.37, being at the rate of 69.03 cents per foot for said 90 feet, and in the collector's roll for same year under same assessment number, John Stevenson is entered as owner of part of lot 72, having 24 feet frontage on north side of Lindsey avenue, and opposite thereto, in pencil, under the head of "Local Improvement Rates," the said sum of \$62.37 is entered and charged as payable by him in respect of said property.

9. Plan No. 1057 was registered in March, A. D., 1892, and a copy thereof deposited with the treasurer of the city of Toronto, pursuant to section 88, of the Registry Act, and in the assessment roll for 1892, under assessment 4647, appears the name of Richard Hayes, as owner of 14½ feet by 90 feet on the corner of Gladstone avenue and Lindsey avenue, and in the local improvement roll for that year, prepared by the assessment commissioner Richard Hayes, is charged for the extension of Gladstone avenue, \$62.37, and in the collector's roll for the same

Statement. year under the same number (4647), the name of Richard Hayes, appears for 14 feet 6 inches on Lindsey avenue and opposite thereto the said sum of \$62.37 is entered and charged in pencil as local improvement rates, payable by him in respect to said property.

10. The taxes for 1891 and 1892, including the local improvement rates, have all been paid.

11. On September 30th, 1892, the plaintiff purchased from W. G. Cuthbertson, lots 1 and 2, on plan 1057, each having a frontage of 13 feet 5 inches on Lindsey avenue by a depth of 71 feet on Gladstone avenue.

12. In the assessment roll for 1893, which was prepared in 1892, under the provisions of section 52, of the Consolidated Assessment Act, 1892, and of by-law 2438 of the city of Toronto, printed on page 60 of the consolidated by-laws, William G. Cuthbertson is assessed as owner, and James Gordon as occupant, of 14 feet 6 inches by 130 feet, at the corner of Lindsey avenue and Gladstone avenue, the number of said assessment being 4341.

13. In the Assessment Commissioner's Local Improvement Roll for 1893, under said assessment number 4341, William G. Cuthbertson is assessed for \$62.37 for extension of Gladstone avenue, being 69.03 cents per foot, for 90 feet on Gladstone avenue, and in the collector's roll for same year, under same number, 4341, William G. Cuthbertson is entered as owner, and James Gordon as occupant of a corner lot, having a frontage of 14 feet 5 inches on Lindsey avenue and opposite the same in ink is charged under the head of local improvement rates, \$62.37, with the words "refused to pay" written opposite thereto.

14. In 1893 a demand in writing was made by the tax collector for the ward in which the said lands are situate for the taxes alleged to be due in respect of said assessment number 4341 and the amount so demanded includes *inter alia* the said sum of \$62.37. The plaintiff has paid the remainder of the said taxes, but he refuses to pay the said sum of \$62.37, and the same

is now charged in the defendants' books against the said Statement.
corner lot (14 feet 6 inches by 90 feet), described in the
last paragraph.

15. The plaintiff contends that the charge of \$62.37 in the rolls for 1893, against the said 14 feet 6 inches at the corner of Gladstone avenue and Lindsey avenue is incorrect, and is a cloud upon his title to lot No. 1, on plan 1057, and has prevented him from selling his said lot, and he claims damages in respect thereof.

16. The defendants have refused to amend the said collector's rolls or the local improvement rolls, or to apportion the said local improvement rates, though requested to do so before this action was commenced.

C. R. W. Biggar, Q. C., for the plaintiff.

W. R. Meredith, Q. C., for the defendants.

December 28th, 1894. STREET, J. :—

The plaintiff alleges that the effect of charging lot 1 with the whole annual charge of \$62.37, originally imposed upon the larger parcel, is to render that lot unsaleable, and he brings this action asking for a declaration that to do so is illegal and operates as an improper encumbrance upon it, and that defendants should be ordered to remove it or to reduce it by properly apportioning it. The defendants, by their answer, insist that they have the right to impose the charge in the first place upon any portion of the land originally charged: that the portion charged is the only part properly chargeable with it; and that the plaintiff shews no ground for relief.

By sec. 612 of R. S. O. ch. 184, the city council had power to pass by-laws for providing the means of ascertaining and determining what real property would be immediately benefited by any proposed improvement, and the proportions in which the assessment was to be made on the various portions of real estate so benefited, subject to appeal from such assessment to the Court of Revision and

Judgment.

Street, J.

the County Judge ; also for assessing and levying by means of a special rate the cost of opening any street ; such special rate to be an annual rate, to be assessed and levied “ according to the frontage thereof, upon the real property fronting or abutting upon the street.”

By section 623 of the Act it is enacted that where a by-law passed under the provisions of section 612 of the Act, provides that the special rate shall be a frontage rate, it shall be sufficient if the by-law describe the street or place or part thereof, whereon or wherein the local improvement is to be made, by a general description thereof, stating the points between which it is to be made ; and it shall not be necessary to state the value of the real property ratable under it, or to impose a rate thereon by any description other than that hereinbefore mentioned ; but the council shall procure a measurement of the frontage liable to the rate mentioned therein, and of the frontages of the several lots or parcels of land liable to such rate, and shall keep a statement of the same open for inspection in the clerk’s office for ten days before the final passing of the by-law ; and shall publish a notice containing, amongst other things, the assertion, “ that a statement shewing the lands liable to pay the said rate and the names of the owners thereof, so far as they can be ascertained from the last revised assessment roll, is now filed in the office of the clerk of the municipality, and is open for inspection during office hours ” ; and stating also that a Court of Revision would be held on a day named to hear complaints against the proposed assessment.

In the present case, the city council having passed a by-law providing for the extension of Gladstone avenue, and having caused the notice required by section 623 of the Municipal Act to be published, made a statement of the measurement of the frontages intended to be assessed and the other particulars required, and had it open for inspection in the clerk’s office. This statement is headed “ Assessment of property that will be equally and specially benefited by the extension of Gladstone avenue between

its north terminus and Hamilton street"; then follows a statement with columns for the consecutive numbers of the assessment, the owner's name, the frontage, and the annual payment intended to be assessed, under the general heading "West Side"; the columns contain the frontage on the west side of the extension, beginning from the south. No. 53 is as follows:—

Judgment.

Street, J.

Owner.	Frontage.	Annual Payment.
"John Stevenson.	90	\$62.37."

There appears to have been no appeal by which this particular assessment was altered, and the by-law was duly passed.

The evidence shewed that under the assessment roll of 1891, being the last revised roll before the passing of the by-law and the giving of the notice above mentioned, John Stevenson was assessed as the owner of the 24 feet of lot 72 on the north side of Lindsey avenue, which had not been expropriated to form Gladstone avenue, and also of lots 71 and 70 on the north side of Lindsey avenue adjoining lot 72, the whole forming a block having a frontage of 84 feet on the north side of Lindsey avenue by 90 feet on Gladstone avenue, as extended.

One of the questions to be determined is, what is the lot or parcel of land which we must take to be included in the assessment above set forth. The by-law by which the rate is imposed is no more specific than the statement filed in the clerk's office: it simply in terms imposes a rate upon the frontage of the real property on Gladstone avenue without specifying any depth or other standard for ascertaining what property is intended to be charged. In this, however, the by-law follows the directions in the statute, and I desire, if possible, to discover from the statute what was intended. Sub-section 2 of section 623 seems to assume that the "lots or parcels of land" of which the frontage is given are to become liable to the rate, and I think that in each case the smallest lot or parcel of land that will answer the whole of the particulars given in the statement filed in the clerk's office under section 623

Judgment. should be taken, because the person intended to be assessed
Street, J. has a right to assume that no part of his property, beyond
the smallest lot answering the description in the statement
is proposed to be included.

Thus, in the present case, John Stevenson was assessed as owner upon the general assessment roll for lots 70 and 71 and 24 feet of 72, the whole being vacant. The largest interpretation would make the whole block of land owned by him, which had a frontage of 90 feet on Gladstone avenue, liable to the charge; the most restricted interpretation consistent with the giving of any meaning at all to the assessment is to treat the line between the lot fronting on Gladstone avenue and the lot adjoining it, as the limit of the land charged. Following this latter construction, I am of opinion that the portion of lot 72 which remained after the laying out of Gladstone avenue, namely, 24 feet on Lindsey avenue by 90 feet on the avenue, was assessed for the annual charge of \$62.37. If John Stevenson had at the time been owner of a smaller part only of lot 72 abutting on Gladstone avenue I should have considered the charge as restricted to that part.

That assessment was made by the by-law for all time to come, and no new assessment for the recovery of this special rate thereafter was necessary or possible. All that remained to be done was to collect it in each year.

The fact that the lot 72, originally assessed, was afterwards subdivided and became the property of different owners, could make no difference in the nature or extent, of the charge created in favour of the city by the by-law. It was as if a mortgage of lot 72 had been given then to the city payable by instalments. No matter what changes in the tenure should be made by the owners of the equity of redemption, the charge remained as originally created covering the whole. On 5th March, 1892, the three lots 70, 71 and 72, having a frontage of 84 feet on Lindsey avenue by 90 feet on Gladstone avenue, were subdivided. Lot 1 in the subdivision has a frontage of 13 feet 5 inches

and lot 2 a frontage of 13 feet $3\frac{1}{2}$ inches on Lindsey avenue by a depth of 71 feet; so that sub-lot 1 on the subdivision is taken entirely from the original lot No. 72, and sub-lot 2 is partly, but not entirely, taken from that original lot; the northerly 19 feet of the original lot 72 forms a part of the new sub-lot No. 7 upon the new plan. In the assessment roll for 1893 (prepared in 1892), William G. Cuthbertson is assessed as owner of $14\frac{1}{2}$ feet at the corner of Lindsey avenue and Gladstone avenue by 130 feet on the latter avenue, and James Gordon is assessed as occupant. William G. Cuthbertson is also assessed as owner of the 14 feet 3 inches on Lindsey avenue, next adjoining on the west the last mentioned parcel, stated also to be 130 feet in depth. These two lots more than cover the whole of the original lot No. 72. In the collector's roll, based upon this assessment roll, Cuthbertson, as owner, and James Gordon, as occupant, are entered opposite the corner lot having a frontage of $14\frac{1}{2}$ feet on Lindsey avenue, and under the heading "special rate" is entered \$62.37. The right to enter the whole of this tax against a part only of the land chargeable with it is the question sought to be determined in this action.

Judgment.
Street, J.

The right to place special rates of this kind upon the collectors' roll is placed upon section 343 of the Municipal Act and section 119 of the Assessment Act, R. S. O. ch. 193, both being in force when the by-law was passed. Under section 343 of the Municipal Act it is enacted that:

Every special assessment made, and every special rate imposed and levied, under any of the provisions of this Act, and all sewer rents and charges for work or services done by the corporation, on default of the owners of real estate, under the provisions of any valid by-law of the council of the said corporation, shall form a lien and charge upon the real estate upon or in respect of which, the same shall have been assessed and rated or charged, and shall be collected in the same manner, and with the

Judgment. like remedies, as ordinary taxes upon real estate are collect-
Street, J. able, under the provisions of the Assessment Act.

Under section 119 of the Assessment Act, R. S. O., ch. 193, and under section 119 of the Consolidated Assessment Act of 1892, 55 Vict. ch. 48, the clerk of the municipality is required to make out the collector's roll from the assessment roll for the year with a separate column for each special rate.

Under these sections, the only machinery for collecting the amounts charged for local improvements is provided, and it must be applied with such modifications as are necessary. The annual sum chargeable against the whole of each parcel assessed under the by-law must appear upon the collector's roll against that parcel and against the person or persons to whom that parcel, however subdivided, is assessed upon the assessment roll for the year; where, as here, there have been subdivisions subsequent to the by-law, the different parcels, with the persons assessed for each must be bracketed, and the annual sum charged against the original parcel placed opposite the bracket as that for which the parcels and the persons assessed for them are liable under the special rate. The boundaries of the parcel originally charged will, in very many cases of subsequent sub-divisions, not coincide with the subdivided parcels as they are assessed. That is the case here, lots 70, 71 and 72 have been subdivided without regard to the boundaries of those original lots: sub-lot 2 is composed partly of lot 71 and partly of lot 72, and a brick house upon it is partly on lot 71 and partly on lot 72; again, sub-lot 7 is composed of the northerly 19 feet of lots 70, 71 and 72, and has its front on Gladstone avenue. A building upon it is partly on lot 71 and partly on lot 72. All these sub-lots are properly and necessarily assessed upon the general assessment roll for the year, according to the manner in which they are now built upon and occupied; but as all the persons assessed for any part of lot 72, are jointly and severally liable for the annual special rate imposed under the by-law, the only way in

which the machinery for collecting it can be applied is by bracketing those persons with the original lot 72 by its present proper description in the way I have indicated as being together liable for the \$62.37.

Judgment.

Street, J.

The clerk of the municipality in preparing the collector's roll in the present case has selected the parcel of land as now subdivided, which abuts on Gladstone avenue, and has placed against it the whole of the annual charge of \$62.37, payable in 1893. This has probably been done because of the uncertainty in his mind as to the extent of the parcel actually liable for the rate; but the result is that this parcel, which only constitutes about half the parcel really chargeable is made to appear chargeable with the whole rate, instead of with only half of it; and although the plaintiff purchased both parcels, and would, perhaps, not have suffered much injury, so long as he held both, he has sold sub-lot 2, subject to all rates and taxes, and finds himself chargeable with the whole rate as the owner of lot 1, instead of with the part only which he should have borne. The answer of the city authorities to his complaint is that if he pays the whole he will have his recourse against the owners of the other parts of the original lot 72 for contribution.

I do not think they are entitled to take this position. They are bound to shew upon the collector's roll as far as possible who are the persons who ought to pay the tax at all events, and they should not be permitted to pick out one owner and one piece of land and leave that one to fight out with the other owners of the other parcels whether they are liable to repay any part to him. Where all are bracketed together for the amount, the remedy of one paying the whole against the others is made clearer at all events. In the event of non-payment, the proper part only will be sold for the arrears, and the chances that any one of the owners shall not be required to pay the whole are improved. In short, the city should be required to exercise its statutory right to collect these amounts in accordance with the statute, and not in a way which,

Judgment. while it may save trouble to the persons preparing the collectors' roll, is not in accordance with the statute. The
Street, J. care exercised in charging the proper persons and the proper land should be all the greater in view of the fact that it is all done after the revision of the lists is complete, and that there is, therefore, no appeal save to the Court.

I think, therefore, that the plaintiff is entitled to a declaration that the imposition of a charge for the whole \$62.37 upon his single parcel is illegal and that it must not be enforced, and he should have his costs of the action, less \$31.18, being one-half of the rate imposed, which it is right that he should pay, and which I make him pay in this way.

G. F. H.

[CHANCERY DIVISION.]

PATTEN V. LAIDLAW.

*Payment—Payment into Court—Effect of—Subsequent Order for Costs—
Claim of Set-off.*

In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lienholders. Payment of the former sum into Court was ordered and made, the amount, however, being insufficient to pay the claims of lienholders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into Court :—*Held*, that by the payment into Court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in.

THIS was an action to enforce mechanics' liens in which Statement.
a reference was made to the Master at Hamilton. By the report, a sum of \$392 was found due by the owner Janet Laidlaw, to the defendant Doidge, a contractor, and a further sum of \$101.50 was found due by her to the plaintiff. Sums amounting to \$295.36 were found due by Doidge to the plaintiff and other sub-contractors, and he was ordered to pay \$137.61 to the plaintiff as costs of the proceedings. The owner Janet Laidlaw was ordered to pay into Court the moneys found due from her within thirty days from the making of the report, and she did so. The amount so paid in by her was insufficient to pay the amounts found due by Doidge to the plaintiff and the other lienholders. The defendant Doidge appealed against the report, serving all the other parties, plaintiff as well as defendants, with notice of his appeal. After argument, the appeal was dismissed with costs, payable by Doidge to his co-defendants Laidlaw and McCullough, who alone had appeared upon the appeal. The defendant Laidlaw now asked that the costs of the appeal might be ordered to be paid out of the moneys paid by her into Court, upon the ground that otherwise she would lose them, owing to Doidge's inability to pay.

Argument. The motion was argued on November 20th, 1894, before STREET, J.

O'Heir, for the applicant.

Logie, for the other defendants.

No one appeared for the plaintiff.

January 12th, 1895. STREET, J.:—

I can find nothing in the rules of Court or the statute to aid the contention of Mrs. Laidlaw, and the question must, therefore, be determined upon principle. The contention is that a certain sum having been found due by her to Doidge, and a certain smaller sum being due by Doidge to her and McCullough for costs of the appeal, she should be allowed to reduce the sum payable by her to Doidge by the amount of the costs of the appeal. But an insuperable difficulty in the way of this being done, it seems to me, is that there is nothing due by her to Doidge, and there is, therefore, nothing in her hands from which she can deduct the costs of the appeal. The Master's report, it is true, found a sum of \$392 against her and in Doidge's favour. She was ordered to pay it, and she did pay it. The report containing the findings has been made and stands confirmed, and the rights of all parties under it are fixed. Mrs. Laidlaw owes none of the parties anything. The payment into Court was a discharge of her liability. The money she paid into Court is no longer hers, but is there for distribution according to the findings of the report. It might have been ordered to be paid by her direct to the persons entitled, but as a matter of mere convenience it is ordered to be paid into Court because of the complications involved in its distribution. When she submitted to the report and paid in her money, her liability to Doidge was ended, unless a further sum had been found against her upon his appeal.

She has, therefore, no money in her hands and no right to the money in Court, and must look to Doidge personally for her costs of the appeal.

[CHANCERY DIVISION.]

IN RE THE TRUSTS CORPORATION OF ONTARIO AND
BEHMER.

*Vendor and Purchaser—Contract to Buy from Administrators—Execution
—Priority.*

The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his life time issued execution thereon under an *ex parte* order therefor against the estate in the hands of the administrators :—

Held, that the execution formed no charge or encumbrance on the lands contracted to be sold.

Orders should not be made *ex parte* allowing issue of execution against goods of a testator or intestate in the hands of an executor or administrator.

THIS was a petition under the Vendors and Purchasers **Statement.** Act. The vendors were the administrators of the estate of Adam Doersam, who died intestate on April 27th, 1894, owner in fee of certain real estate in the town of Waterloo, and leaving also certain personal estate, the whole assets being insufficient to pay his debts. On October 17th, 1894, the vendors entered into an agreement in writing with the purchasers for the sale to the purchasers and the purchase by them of certain of the real estate for the sum of \$10,000. After the making of this contract, but before it could be carried out, one Peter Doersam, who had recovered a judgment against the deceased Adam Doersam, in his lifetime, obtained upon *præcipe* an order allowing him to carry on the judgment against the vendors as the administrators of the deceased and to issue execution against the vendors to be levied of the goods, chattels and lands of the deceased in the hands of the vendors to be administered. He thereupon placed an execution in the hands of the sheriff of the county of Waterloo, in accordance with the terms of the order so obtained. The purchasers refused to carry out their agreement until this execution was removed, alleging that it was a charge upon the land of the deceased in the hands of the vendors. The vendors then filed this petition to have a declaration that the execution formed no charge upon the lands in their hands.

Argument. The matter was argued, on November 21st, 1894, before STREET, J.

F. E. Hodgins, for the petitioners. As to executions coming in after a contract for sale, I refer to *Re Lewis v. Thorne*, 14 O. R. 133; *Parke v. Riley*, 3 E. & A. 215; Dart on Vendor and Purchaser, 6th ed., p. 530. The Devolution of Estate Act, at all events, enables the executor or administrator to make a good title quite apart from the execution. The assets are a blended fund, and should be realized only by the executor or administrator. The execution creditor should not now be allowed to sell and afterwards account: *Bank of British North America v. Mallory*, 17 Gr. 702. Assets in hands of an executor are a species of trust property: Lewin on Trusts, 9th ed. p. 236. These assets are now, under the Devolution of Estates Act, a trust property in the hands of the executor in trust for sale: R. S. O. ch. 110, sec. 32. In *Wyld v. Clarkson*, 12 O. R. 589, it was held that assets vested in an assignee were in *custodiâ legis*.

[STREET, J.--You say the result of the Devolution of Estates Act is to supersede the rights of creditors, as they would be superseded by administration of the estate by the Court?]

Yes. Two late cases are *Parsons v. Gooding*, 33 U. C. R. 499; *Taylor v. Brody*, 21 Gr. 607. I refer especially to Devolution of Estates Act, R. S. O., ch. 108, secs. 4, 7 and 9. See also 54 Vict. ch. 18, sec. 5 (O.); Williams on Executors, 9th ed., pp. 801, 811; *Simpson v. Morley*, 2 K. & J. 71, at p. 76.

December 29th, 1894. STREET, J.:—

Upon the facts set out in the petition herein I am of opinion that the plaintiffs are entitled to the declaration they ask for, viz., that the execution in the sheriff's hands having been placed there after the contract for sale between the vendors and the purchasers had been entered into, forms no charge or encumbrance upon the lands in

question: *Parke v. Riley*, 3 E. & A. 215, 237; *Re Lewis v. Thorne*, 14 O. R. 133; 54 Vict. ch. 18, sec. 5 (O.).

Judgment.

Street, J.

It appears from the petition and papers produced that the execution which has caused the trouble here was issued upon an order obtained on *præcipe* and upon the production of an affidavit which is not before me. It is wrong to order the issue of execution against goods of a testator or intestate in the hands of an executor or administrator without giving him an opportunity to shew cause, and such an execution should not be ordered if the application for it is opposed unless it is established that there are as a fact assets in the hands of the executor or administrator sufficient to answer the debts of the deceased. Otherwise proceedings may be required to prevent the execution creditor from hampering the proper and equal distribution of the estate. The issue of execution *de bonis testatoris* or *intestati* is proper only when it has been first established that the executor or administrator has assets to answer the judgment debt, and a return of *nulla bona* to such a writ is some evidence at all events of a *devastavit*. The Judicature Act does not seem to have altered the law in this regard: Anderson on Execution, 563, *et seq.*

Here it is alleged in the petition that the estate is in fact insolvent, and this, being established, should have been a complete answer to an application for leave to issue execution in the present case; the rights of the creditors in such a case are to be sought under an administration order, so that all may share *pari passu*, under R. S. O. ch. 110, sec. 32; and R. S. O. ch. 108, secs. 4 and 7. The execution here does not appear to have been moved against, and the fact of its being in the sheriff's hands does not create any charge upon the lands in question, because of the prior contract of sale, but I desire to point out that its having been issued at all, would appear from the facts before me, to have been irregular and improper.

A. H. F. L.

[COMMON PLEAS DIVISION.]

CROMBIE v. YOUNG.

Fraudulent Conveyance—Mortgage—Subsequent Voluntary Settlement by Mortgagor—Validity of, against Mortgagee.

Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within the 13 Eliz. ch. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the loan was of less value than the amount thereof.

Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although, from the stagnation in real estate when the mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected.

Statement. THIS was an action brought by the plaintiffs who were judgment creditors of Robert H. Young, to set aside, as fraudulent and void, certain conveyances of real estate made to his wife Elizabeth Young.

The claim set up by the plaintiff was that the defendant Robert H. Young, on the 12th of February, 1889, mortgaged lots 8, 9, and 10 on the east side of Northcote avenue, in the city of Toronto, according to plan 792, to secure the payment of \$3,600, five years from the date thereof, and interest at six per cent. payable half-yearly; that the defendant Robert H. Young, made default in the payment of the interest due on the said mortgage, and on the 22nd of August, 1892, the plaintiff commenced an action on the covenant contained in the said mortgage to pay the said mortgage money, and for foreclosure and immediate possession of the lands, and that judgment was recovered on the covenant on the 4th of October, 1892, for \$3,797.92, and *fi. fa.* goods and lands were issued and placed in the sheriff's hands, but which remained unsatisfied;

That on the 28th of February, 1889, the defendant Robert H. Young, for the alleged consideration of love and affection, conveyed to his wife, the defendant Elizabeth

Young, part of lot number 66 on the north side of Gordon street, in the said city of Toronto, according to plan number 438, described by metes and bounds in the deed; and on the 23rd of March, 1889, James Leighton, for the alleged consideration of \$1,750, conveyed to the defendant Elizabeth Young, lot number 5 on the east side of Beaconsfield avenue, in the said city of Toronto, according to plan number 889, which said lands the plaintiffs alleged were still standing in the name of the defendant Elizabeth Young, and that she was in possession of the same, and in enjoyment of the rents and profits thereof; and on the 4th of September, 1889, Martha Ann Edwards conveyed to the said defendant Elizabeth Young lot number 7 on the west side of Dunn avenue, according to plan number 796, which last named parcel the defendant Elizabeth Young on the 1st of August, 1890, mortgaged to the Home Loan and Savings Society to secure the sum of \$2,500 advanced to her by the said company, and it was alleged that such sum of money was still in her possession.

The plaintiff further alleged that the defendants were married in the year 1876, without any marriage settlement, and that the said Elizabeth Young was not at the time of her said marriage, possessed of any moneys of her own or any separate estate, nor did she since her said marriage obtain any moneys for her separate use or as her own property, but that all properties she had obtained or acquired were in reality purchased by the defendant Robert H. Young, and were paid for by him either by his own moneys or by the conveyance to the grantors of other properties which belonged to him; and that the said defendant Elizabeth Young had no interest, title, right, or claim therein, and that no consideration was given or paid by the defendant Elizabeth Young to the defendant Robert H. Young for the conveyance of any of the properties, but that such conveyances were made voluntarily and were fraudulent and void as against the plaintiffs.

And the plaintiffs claimed that it should be so declared; and that she be declared trustee for her said co-defendant

Statement. of the lands and premises so conveyed or purported to be conveyed to her as aforesaid; and that the said lands and premises be deemed subject to the writs issued by the plaintiff against the lands of the defendant Robert H. Young; that the said defendant be ordered to pay for or account for the said sum of \$2,500 obtained by him by the mortgage of the Dunn avenue property, which should be applied towards payment of the said plaintiffs' claim; that the lands and premises might be sold and the proceeds applied in payment of the amount justly due to the plaintiffs; and for such order as to the Court might seem meet.

The defendants denied that there was any intent to defraud, and alleged that the lands purchased by the defendant Elizabeth Young were purchased by her in good faith out of her own moneys, and that the property conveyed to her in consideration of love and affection was made in good faith and without any fraud or fraudulent intent, and without any intent to defeat, hinder or delay the plaintiffs; that the defendant Robert H. Young, was not indebted to the plaintiffs at the time of the settlement, and was possessed of property amply sufficient to pay all his debts.

The evidence, so far as material, is set out in the judgments.

The action was tried at Toronto, in May, 1893, before ROBERTSON, J., who dismissed the action with costs.

The plaintiffs moved on notice to set aside the judgment entered for the defendants, and to enter judgment in their favour.

In Easter Sittings, May 22nd, 1894, before a Divisional Court composed of ROSE and MACMAHON, JJ., *J. A. Worrell*, Q. C., and *W. D. Gwynne*, supported the motion. The conveyances executed by the defendant, R. H. Young, were fraudulent and void as against the plaintiffs. The conveyances here were purely voluntary; no consideration passed from the wife; she had no money of her own or any separate estate, and any money paid was that of the hus-

band. The husband was indebted at the time the conveyances were made, and therefore they cannot be supported as against creditors by virtue of the 13 Eliz., ch. 5. The mere fact of a man who is indebted, making a voluntary settlement of any part of his estate, raises a presumption of an intent to defraud or delay his creditors, and any creditor who was such at the time of the settlement, or becomes so thereafter, may impeach the settlement so long as any one of the creditors at the time of the settlement remains unpaid: *May on Fraudulent Conveyances*, 2nd ed., pp. 35, 37, 40, 63, 75; *Freeman v. Pope*, L. R. 5 Ch. 538; *Cornish v. Clark*, L. R. 14 Eq. 184; *Beavis v. McGuire*, 7 A. R. 704, 711; *Ex p. Mercer*, 17 Q. B. D. 290. The plaintiff, as mortgagee, was a creditor under the statute: *Oliver v. McLaughlin*, 24 O. R. 41; *Campbell v. Chapman*, 26 Gr. 240; *Ware v. Gardner*, L. R. 7 Eq. 317; *Ex p. Huxtable*, 2 Ch. D. 54; *Clark v. Hamilton Provident and Loan Society*, 9 O. R. 177; *Masuret v. Mitchell*, 26 Gr. 435. A liability arising under a guarantee has been held to come within the statute, and this would apply to a mortgagor who covenants to pay the mortgage money: *Re Ridler*, 22 Ch. D. 74; *Ferguson v. Kenny*, 16 A. R. 276, 287; and see *May on Fraudulent Conveyances*, 2nd ed., 57, where it is said that it is at least doubtful whether a voluntary settlement of all the settlor's property, even if not a trader, can in any case be supported against any, even contingent liability, if that liability represent a debt. In any event the amount by which the mortgage security proves insufficient, constitutes a debt within the statute: *May on Fraudulent Conveyances*, p. 58; *Clark v. Hamilton Provident Loan and Savings Society*, 9 O. R. 177. There was, however, clear evidence of indebtedness apart from the mortgage. The assets were, moreover, not available assets: *Rae v. McDonald*, 13 O. R. 352; *Clarkson v. Stirling*, 14 O. R. 460. 15 A. R. 234; *Warnock v. Kloepper*, 14 O. R. 291, 15 A. R. 324; *French v. French*, 3 Jur. 419; *Ex p. Russell*, 19 Ch. D. 588. Even if it should be held that there was an ad- Argument.

Argument. vance by the wife, the conveyance would only be good *pro tanto*: *Jackson v. Bowman*, 14 Gr. 156; *Collard v. Bennett*, 28 Gr. 556. There is also a distinction in this case from that of a simple mortgage. Here the defendant Robert H. Young was speculating in land. The wife in any event must be deemed a trustee for the husband.

Moss, Q. C., contra. The cases shew that a mortgagee is not a creditor under the statute: May on Fraudulent Conveyances, 63-4, but it is not necessary to consider this aspect of the case, for the evidence is overwhelming that the defendant was solvent at the time of the impeached transactions. The learned Judge had all the witnesses before him, and heard their evidence, and he found, as a fact, that the defendant was solvent, and the Court will not interfere with his finding. The strongest evidence in favour of the defendant is the fact that the mortgagees of the adjoining property of the same character were quite willing on the maturity of their mortgages, to have them extended. The authorities shew that the mere existence of debts is not sufficient to bring the case within the statute. It must be shewn that the debtor was in embarrassed circumstances: *Boustead v. Shaw*, 27 Gr. 280; *Collard v. Bennett*, 28 Gr. 556. At the time these conveyances were made there was no intent to defraud. The defendant looked upon himself as not only not insolvent, but as in unexceptionably good circumstances, and the mortgagees themselves at the time considered the lands comprised in the mortgage as ample security for the mortgage debt. The mortgage was taken on the valuation of a skilled valuator. It is only the subsequent shrinkage in the value of land, unforeseen and unthought of at the time, that has caused the trouble in the payment of the defendant's mortgage, and the evidence shews that even now the mortgage security is ample. The position of the defendant must be looked at at the time that the conveyances were made: May on Fraudulent Conveyances, p. 35; *Kent v. Riley*, L. R. 14 Eq. 190.

November 19th, 1894. MACMAHON, J.:—

Judgment.

MacMahon,
J.

The case presents features not found in any of the cases I have examined.

The conveyances being attacked are three in number.

[The learned Judge here set out the particulars of the mortgages and conveyances as already mentioned and continued:]

The allegation in the statement of claim is that all the said properties were purchased by Robert H. Young, and were paid for by him either with his own moneys or by the conveyance to the grantors of properties which belonged to the said Robert H. Young, and that Elizabeth Young had no interest in the said moneys and properties which formed the consideration for the said purchases.

It is also alleged that some of the said properties were at the time charged with incumbrances which the said Robert H. Young has paid off and discharged.

Robert H. Young was the owner of a farm in the township of Scarborough, subject to the life interest of his father therein. This farm he exchanged on the 31st of January, 1888, with James Leighton for thirteen houses and lots on Northcote avenue, such houses and lots being subject to mortgages for \$15,500 thereon, which Young covenanted to pay, Leighton agreeing to pay Young \$1,000 in cash or secured by a second mortgage on the farm. There was also at this time coming to Young \$1,000 from one Nelson who held the first mortgage on the farm for \$7,000 but who in fact had only paid \$6,000 of the mortgage money.

One of the mortgages given by Leighton on the Northcote avenue property was held by The Peoples Loan Company drawing interest at seven per cent.; and it was when Young was conveying one of those thirteen lots to a Mr. Frame that the plaintiffs' solicitors offered to accept the mortgage on these houses for the \$3,600 and reduce the interest to six per cent. The houses covered by the plaintiffs' mortgage have the street numbers 109, 111, and 113.

Judgment. A number of the remaining houses conveyed by Leighton to Young were disposed of by Young to various purchasers who assumed the existing mortgages thereon, and where such mortgages are still existing the mortgagees are satisfied with the security.

MacMahon,
J.

One of the tests to apply in this case in considering whether the settlements though voluntary, are fraudulent and void, is whether *at the time of the settlements* in favour of the wife the property mortgaged was insufficient to pay and satisfy the mortgage debt: *Masuret v. Mitchell*, 26 Gr. 435. And in connection with the test so applied we may also consider what was the settlor's financial position, outside of the value of the property mortgaged to the plaintiffs, when the impeached settlements were made.

[The learned Judge then considered the evidence as to the value of the property mortgaged at the time of the execution of the settlements and continued:] So there is no question that at the time of the settlements there was in the property mortgaged to the plaintiffs a very large margin beyond the amount of the mortgage.

These houses were offered for sale under the power of sale, but there were no bidders.

On the 26th of February, 1889 (two days prior to the first deed in favour of his wife), Young's financial position outside of his liability on the mortgages given by Leighton and assumed by Young, was :—

Deposit in Farmers' Loan.....	\$1,700
Mortgage on Scarborough farm.....	1,000
Due on same farm under agreement with Leighton	1,000
Lots in Portage la Prairie (since realized on) ..	600
Mortgage on Manitoba lands.....	2,000
	<hr/>
	\$6,300

When the second conveyance of the 23rd of March, 1889, was made by Leighton to Mrs. Young, the position of Young was not materially different from what it was on the 26th of February, previous.

When the third impeached conveyance was made to Mrs. Young of the Dunn avenue property on the 4th of September, 1889, his position was :

Judgment.
MacMahon,
J.

On deposit Farmers' Loan.....	\$1,646 00
Mortgage on Northcote avenue property..	340 00
Portage la Prairie, mortgage and lots	2,600 00
	<hr/>
	\$4,586 00

Prior to Young's removal from Scarborough to Toronto, he was the holder of twenty paid up shares in the Central Bank, the par value of which was \$2,000. The bank was put in liquidation in 1888, and upon receiving notice claiming to make him a contributory, Young saw Mr. Howland, one of the liquidators, and deposited with him as security for the payment of any liability by the liquidators, the mortgage for \$2,000 on the Portage la Prairie property. After retaining the mortgage for some months it was returned to him. There were no dates given as to when the mortgage was deposited or returned ; but Young said he had no notice of his being made a contributory until the time he deposited the mortgage, and that he had no notice when the conveyances of February and March, 1889, were made to his wife. In this he is contradicted by his wife, who said she had heard something about the Central Bank, and there was going to be trouble for the shareholders, although she said it had nothing to do with causing the conveyance to be made to her.

The Central Bank recovered judgment for \$2,000 and costs about the 12th of October, 1889, as on that day *fi. fa.* goods and lands were issued and placed in the hands of the sheriff. This suit was settled on the 12th of September, 1891, by the payment by Young to the liquidators of \$1,390. This would not avail the plaintiffs in their attack on the settlement, even although they were regarded as future creditors, because that indebtedness to the bank was paid long prior to the plaintiffs supposing they would ever be creditors of Young. See May on Fraudulent Convey-

Judgment. *ances*, 2nd ed., 63; *Jenkyn v. Vaughan*, 3 Drew. 419; *MacMahon, Freeman v. Pope*, L. R. 5 Ch. 535.
J.

May on *Fraudulent Conveyances*, 2nd ed., in dealing with the question as to those entitled to rank as creditors under the Statute of Elizabeth, thus refers to the position of mortgagees, at pp. 163-4: "Mortgagees, therefore, who have a specific portion of property set aside, and, so far as their interest is concerned, freed from liability to the general debts, and to which they can, primarily at least, resort for the satisfaction of their claim, are not to be regarded as 'creditors,' or, at least, a mortgage debt is not properly speaking a debt for the purposes of the statute: *Lush v. Wilkinson*, 5 Ves. 384; *Freeman v. Pope*, L. R. 5 Ch. 538; and see *Ex p. Huxtable*, 2 Ch. D. 54, for a fully secured debt is generally excluded from the estimate of liabilities. There seems at one time to have been some uncertainty on the point, and some confusion as to whether mortgagees were to be looked upon as creditors under the statute, or as purchasers under 27 Eliz. ch. 4; but it has been decided that they are purchasers under the later statute: *Lister v. Turner*, 5 Ha. 281; *Dolphin v. Aylward*, L. R. 4 H. L. 486. If the property mortgaged is not sufficient to satisfy the debt, the mortgagee, of course, will be a creditor for the balance."

Where, however, the settlement is impeached, and the attack is made by a mortgagee, who claims to be a creditor of the settlor, the point to be considered in dealing with the question of whether the settlor was in a position to make a voluntary settlement, is to get at the selling value of the mortgaged property at the date of the settlement: *Masuret v. Mitchell*, 26 Gr. 435, at p. 440.

The evidence is overwhelmingly in favour of the selling value of the mortgaged property being \$2,400 in excess of the mortgage to the plaintiffs, when the last, as well as the first, of the impeached transactions took place. But, besides this, there were the other assets of the settlor amounting to a very considerable sum, which might well entitle him to consider he was in a position to make a settlement on his wife.

There was an argument by counsel for plaintiffs, based on an expression made use of by Young on his examination, when he stated that his wife had asked him to put this property in her name because he was speculating all the time. This, it was urged, shewed that Young and his wife were providing against future contingencies of the business in which he was engaged.

If a man makes a voluntary settlement, contemplating at the time entering into speculative transactions whereby he would be likely to incur heavy liabilities ; or where the settlor takes the bulk of his property out of the reach of his creditors shortly before engaging in trade of a hazardous character, such settlement may be set aside at the suit of creditors who became such after the settlement : *Crossley v. Elworthy*, L. R. 12 Eq. 158 ; *Mackay v. Douglas*, L. R. 14 Eq. 106. But a man who is trading is not precluded from making a settlement, so long as he has ample means to pay and does pay the debts that are due by him at the time of the settlement : *Collard v. Bennett*, 28 Gr. 556. Young said he promised his wife before leaving Scarborough for the city, that he would give her at least a part of any property he acquired in the city, and he was when the conveyances were made to her carrying out that arrangement. His only transactions were connected with real estate, and these were not of an extensive character. Even had the plaintiffs been creditors at the time, or had become such immediately after the settlement, he has satisfied the onus which would thus have been cast upon him of shewing that at the time of the settlement he was solvent : *Crossley v. Elworthy*, L. R. 14 Eq. 158. And besides Young never contemplated, or had reason to suppose, from the condition of the real estate market in the year 1889, that the plaintiffs would ever be future creditors of his.

Another point to be considered, in connection with the argument addressed to us, is anent Young's partnership in the hair-cloth factory at Toronto Junction. He became a partner in January, 1890, agreeing to put into the concern as his capital the sum of \$5,000, and he paid in \$4,700.

Judgment.
MacMahon,
J.

Judgment. He said he had no intention of becoming a partner until just prior to his joining the partnership; and that he examined into the affairs of Cameron (who owned the factory), and found he was rated in the Mercantile Agencies at from \$10,000 to \$20,000, and did not, therefore, consider he was running any risk when investing this capital therein. Had he contemplated entering into that business in September, 1889, when the settlement of the Dunn avenue property was made upon the wife, and debts were incurred for which the partnership became liable, as to such creditors of the partnership the question that arose in *Buckland v. Rose*, 7 Gr. 440, and in *Mackay v. Douglas*, L. R. 14 Eq. 165, would have arisen here, as then the settlement would have been made when future indebtedness was contemplated. But as already stated, Young had no intention of becoming a member of such partnership until after the settlement. And I repeat there is nothing to shew that at the time the settlement of September, 1889, was made, Young supposed, or would reasonably suppose, the plaintiffs would ever be creditors of his; and any indebtedness of the hair-cloth business for which Young was liable has been paid.

Lindley, L. J., in *Ex p. Russell*, 19 Ch. D. 588 at p. 601, says that *Mackay v. Douglas*, L. R. 14 Eq. 106, is "One of the most valuable decisions we have on the Statute of Elizabeth." And in the judgment in the *Mackay* case, at p. 121, Sir W. Malins, V. C., said, "If Mr. Douglas had neither gone into, or contemplated going into, trade at the time (of the settlement), but some years afterwards, by a totally new arrangement, had made up his mind to do so, I should have had no hesitation in coming to the conclusion that his subsequent insolvency could have had no effect in producing invalidity of the settlement which he had made upon his wife and family." There being no intention existing to go into business at the time of the conveyance of the 4th of September, his losses thereby created could have no effect in invalidating the settlement, at all events, at the instance of these plaintiffs.

The language of Lindley, L. J., in *Ex p. Mercer*, 17 Q. B. D. 290, at p. 301, is very apposite to the case we are considering. He said, "It is true that voluntary settlements have been set aside under the statute, as it has been construed for a great number of years, in cases in which there was no actual intention to defraud. It has been held to be sufficient if, when the settlement is executed, the circumstances are such that it must have that effect. But the language which has been used in a great many cases, that a man must, in point of law, be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact, and by consequences which can be foreseen with those which cannot. But, although I am not prepared to say that a voluntary settlement can never be set aside under the Statute of Elizabeth, as it has been construed, unless there has been in fact an intention to defraud, I am not aware of any decision which goes the length of upsetting the present deed under the circumstances with which we have to deal. In this case there was no intention to defeat the plaintiff; and when the settlement was executed, the probability of the plaintiff obtaining substantial damages was very slight. The case is certainly not within the language of the statute."

Judgment.

MacMahon,
J.

Who could have foreseen at the time this mortgage was taken by the plaintiffs, that the result would be that which we now know exists, namely, that property in certain portions of the city, would, within three years of the giving of the mortgage have fallen in value at least from thirty-five to forty per cent. At the time the mortgage contract was entered into, the property was regarded as being worth \$6,000, and we must assume when the plaintiffs were desirous of having themselves substituted as mortgagees at a lower rate of interest in place of the then existing mortgagees, that they regarded the security as ample, not only at the time the advance was made, but when the mortgage would mature.

This brings me to a consideration of the authority refer-

Judgment.

MacMahon,
J.

red to by Mr. Worrell in May on Fraudulent Conveyances, 2nd ed., p. 57, where the author states: "It seems at least doubtful whether a voluntary settlement of all the settlor's property, even if not a trader, can in any case be supported against any even contingent liability, if that liability ripens into an actual debt."

The text is fully borne out by the observations of Lord Selborne in *Re Ridler*, 22 Ch. D. 74, which was an action against a guarantor, who had, after giving a guarantee for his son's indebtedness, made a voluntary settlement of the whole of his property, and the Lord Chancellor, at p. 80, says that the matter must be looked at "as if the event had already happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay." He then points out that "the son had no margin of property beyond what was employed in his farm and what he had borrowed from the bank, for which the bank would not give him credit without a guarantee. I think that he had not assets to such an extent as to prevent the father's liability under the guarantee from being a serious and substantial one at the time when the settlement was executed."

And Cotton, L. J., says, at page 82: "Then as to the point that the settlor was not indebted, but only subject to a liability which might never become a debt. A man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen. In the circumstances of this case, any reasonable man must have looked upon this guarantee as one which would probably be enforced, and the settlement must be taken as made with intent to delay or hinder creditors."

In the case in hand, when the settlements were made the view that was taken of the security was the one entertained alike by the mortgagor and the mortgagees, namely, that the property was ample security for the payment of the amount advanced, not only at the time of the acceptance of the mortgage, but at the time it would mature,

otherwise the plaintiffs would not have been so desirous as they appear to have been to secure the investment. Certainly the view of the settlor, at the time the settlements were made, was the reasonable one to take, viz., that the property being ample security, there was no probability of the covenant for payment being resorted to, and in that case it will not be said that the settlement was made with intent to delay or hinder creditors.

Judgment.

MacMahon, J.

If at the time a mortgage is given, payable, say in five years, the mortgaged property is regarded by both the mortgagor and mortgagee as ample security for the mortgage debt, then if the mortgagor cannot make a voluntary settlement (although otherwise financially in a position so to do), because he may possibly become a debtor to the mortgagee by reason of the depreciation of the mortgaged property, just before the expiration of the five years, the argument must hold good as to a mortgage having ten years to run, and a like result happening.

In my view the present case does not come within the evil to remedy which the statute was passed.

The motion must be dismissed with costs.

ROSE, J.:—

It is not unfair to assume that the loan would not have been made in this case, had the mortgagees not been convinced that the security was ample, and so ample as to justify a loan of trust moneys upon it; and I think on the evidence the value of the property then was such as to justify the trustees in lending the money.

The settlements complained of were made in the same year. No appreciable change in values took place during that year.

Moreover, apart from the almost universal stagnation of the real estate market, I am of the opinion on the evidence, that there is full value in the property now, not realizable at present, but which can be realized when the market changes if the property is not allowed to go to

Judgment. waste. I do not, on the evidence, find it at all safe to
Rose, J. infer that there was any intention to defraud these mortgagees when the impeached transfers were made. My mind turns the other way. I cannot think that if in 1889 the mortgagees had been told that the mortgagor was making these transfers, it would have occasioned them any alarm, for they must then, I think, have felt that they had ample security; nor do I think that it could have occurred to the mortgagor that what he was doing could in any wise jeopardize the plaintiff's claim, for there was nothing then to lead him to suppose that there was not a very substantial margin of value in the property over and above the mortgage debt.

Having arrived at such conclusions, I find it quite impossible to say that the transfers were made with any intent to defraud the plaintiffs, and so I think the action must fail.

This conclusion seems to me to be in accordance with the principles upon which *Masuret v. Mitchell*, 26 Gr. 435, and *Oliver v. McLaughlin*, 24 O. R. 41, were decided.

I agree that the motion must be dismissed with costs.

G. F. H.

[COMMON PLEAS DIVISION.]

SMITH V. THE CORPORATION OF THE COUNTY OF
WENTWORTH.

*Way—Toll Roads—Toll Chargeable on Intersected Road—Mandamus—
R. S. O. ch. 159, secs. 2, 87, 157, 52 Vict. ch. 27 (O).*

Section 87 of R. S. O. ch. 159, as extended by section 157 of that Act, and by 52 Vict. ch. 27 (O.) applies not only to toll roads owned or held by private companies, or municipal councils, but also to all toll roads purchased from the late Province of Canada, so that where one of such roads is intersected by another of them, a person travelling on the latter road, shall not be charged for the distance travelled from such intersection, to either of the termini of the intersected road, any higher rate of toll than the rate per mile charged by the company for travelling along the entire length of its road from such intersection, but subject to the production of a ticket, which he is entitled to receive from the last toll gate on the intersecting road, as evidence of his having travelled only from such intersection.

Mandamus granted to compel the issue of such tickets.

THIS was a special case stated for the opinion of the Statement.
Court as follows:—

1. The plaintiff resides in the township of West Flamborough, in the county of Wentworth.

2. The defendant is the owner of a toll road which is known as "The Dundas and Binkley Toll Road," and which intersects another toll road in said county known as "The Hamilton and Ancaster Toll Road," the said two roads forming the principal thoroughfares between the town of Dundas, the townships of Ancaster, West Flamborough and Beverly, and the city of Hamilton.

3. The said defendant does not issue tickets at the toll gates on the said intersecting road.

4. The Dundas and Binkley toll road was constructed in 1847, by the Gore District council, under the provisions of by-law 163 of the said council, dated 10th October, 1848. The by-law purports to be passed under the provisions of 4 & 5 Vict. ch. 10, intituled "An Act to provide for the better internal government of the Province which formerly constituted the Province of Upper Canada."

5. No other by-laws have been passed affecting this

Statement. road, nor has there been special Provincial or Dominion legislation affecting it.

6. The Hamilton and Ancaster toll road was originally constructed by the Board of Works, the department of the Government corresponding to the present Public Works Department.

7. Under the provisions of 31 Vict. ch. 12, secs. 52 and 53 (D.) (consolidated as R. S. C. ch. 36, secs. 15 and 16), the Minister of Public Works proclaimed, on the 5th November, 1874, that the said road was no longer under his control.

8. The corporation of the township of Ancaster, by by-law 222 of the said township, assumed the control and management of the said road on 12th February, 1876.

9. The said road has, since the said 12th February, 1876, continued a toll road, and the revenue derived therefrom has been received by the said township of Ancaster.

10. The said plaintiff claims that it is the duty of the defendant, at his request, to furnish him with a ticket at the last toll gate on the intersecting road, to be used as evidence of his having travelled on the said Hamilton and Ancaster toll road only from the intersection of the said road by the Dundas and Binkley road, and thereupon to be charged only at the rate per mile charged by the said Ancaster toll road for travelling over the entire length of the said road for the distance between the intersection and either of the termini of the said Hamilton and Ancaster toll road; and asks for a mandamus directed to the said defendant to furnish such ticket.

The question for the Court is whether section 87 of the General Road Companies Act, R. S. O. ch. 159, is applicable to the said Dundas and Binkley road.

The Court shall have power to give judgment according to its opinion on the said facts submitted, and, if the plaintiff is entitled to the relief claimed, may direct a mandamus to the said defendant directing it to furnish such tickets on request.

The costs shall be in the discretion of the Court.

The following sections [secs. 2, 87, and 157 (1)] of R. S. O. Statement. ch, 157, (1887) are referred to herein:—

Sec. 2. All companies incorporated for such purposes as are in this Act mentioned, under any former general Acts relating to joint-stock road companies, before this Act takes effect, shall subsist and continue, notwithstanding the repeal of such Acts, and such companies shall be subject to, and may avail themselves of the provisions of this Act, and in all cases of doubt or ambiguity this Act shall be deemed and taken to be declaratory of the meaning of the said Acts.

Sec. 87. Where a road constructed under this or any former Act intersects a road constructed or owned by another chartered company, no higher rate of toll shall be demanded from the persons travelling along the said last mentioned road, for the distance travelled between such intersection and either of its termini, than the rate per mile charged by the company for travelling along the entire length of their road so intersected; but it shall be incumbent on such persons to produce a ticket from the last toll gate on the intersecting road as evidence of their having travelled only from such intersection.

Sec. 157 (1). The provisions contained in sections 83 to of this Act, all inclusive, shall extend and apply to all road companies, in the collection of tolls and otherwise, whether such roads are constructed under this or any Act in section 2 of this Act referred to, and to all toll roads which may have been purchased from the Government of the late Province of Canada and now are owned or held by private companies or municipal councils.

On December 13, 1894, the case was argued by *G. Lynch-Staunton*, for the plaintiff, and

Osler, Q. C., and *MacBrayne*, for the defendant.

December 15, 1894. BOYD, C.:—

I have considered the question submitted, and think that the answer should be favourable to the plaintiff.

Judgment.

Boyd, C.

Section 87 of the Road Companies Act, R. S. O. ch. 159, has its application extended by section 157, so as to include not only all companies (*i.e.*, private corporations), but also all toll roads purchased from old Canada and now owned or held by private companies or municipalities. This last section is further extended by 52 Vict. ch. 27 (O), so as to cover "all toll roads now owned, leased, held or in possession of any person or persons."

I see no inconsistent context which renders inapplicable the interpretation clauses of the revised statutes to the word "person." The intention of the Legislature is to make the law broad enough to include all toll roads in private or public hands,—barring those constituted under special charter,—and the object of the enactment is furthered by reading "person" to mean "anybody corporate or politic" (R. S. O. ch. 1, sec. 8, sub-sec. 19).

The defendant municipality holding the road in question, "The Dundas and Binkley Toll Road," is within the scope of a body politic and corporate, and is subject to the requirements of section 87 as to the intersection of toll roads.

I answer the question in the special case in the affirmative. If necessary, a mandamus may issue to give effect to this judgment.

I think the plaintiff should get his costs.

G. F. H.

[COMMON PLEAS DIVISION.]

WILKINSON V. WILSON.

Maintenance—Gift of Board and Lodging—Charge on Land—Right of Occupation—Duration of.

A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bed-room and bedding, in the dwelling-house on the farm, and to his board so long as the plaintiff should remain a resident on the farm :—

Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bed-room and board, which was a charge thereon ; that no period was fixed for such occupation, which might be either permanent or temporary, and therefore no forfeiture was created by non-occupation.

THIS was an action tried before MEREDITH, J., without Statement a jury, at Woodstock, on the 25th of October, 1894.

The action was for a declaration that the plaintiff was entitled under a deed, made by his father in favour of the plaintiff's brother of certain farm lands, of an estate in, and a charge on the said lands, and to the use by him of a bed-room, bed and bedding in the dwelling thereon, and to board so long as he should remain a resident on said lands, or to compensation in lieu thereof ; and for damages for the wrongful withholding thereof.

The defendant was the executor of the estate of Arthur Wilkinson, deceased, who by virtue of a conveyance from his father, the late John Wilkinson, (to which Arthur was a party), dated in July, 1884, took (subject to his father's life estate therein) certain farm lands in the township of Zorra, in the county of Oxford, and subject also to the payment of certain sums to his brothers and sister which formed charges upon the lands, and subject also to the following provision in favour of the plaintiff : " To the use by Samuel Wilkinson of a bed-room and bedding in the dwelling house occupied upon the said premises, and to board, so long as he shall remain a resident on said lands, and which the said party of the first part (John Wilkinson) hereby grants unto the said Samuel Wilkinson."

Statement.

At the time of the execution of the deed, John Wilkinson, the father, and his two sons Arthur and the plaintiff Samuel, were living together in the only house on the farm, Arthur and Samuel being joint lessees from their father of the farm for the term of five years from December, 1881.

John Wilkinson died on the 3rd of June, 1894, and during his lifetime by virtue his life estate in the lands he received the rents and profits thereof.

The pecuniary charges on the land were not payable until after the death of John Wilkinson.

Shortly after the expiration of the term of the joint lease from John Wilkinson to his sons Arthur and Samuel, and about the month of January, 1887, the latter left the house in possession of Arthur, and moved upon fifty acres adjoining the lands occupied by Arthur, where he remained two years, during which period Arthur's wife sent the plaintiff's meals to him there. The plaintiff then removed to Toronto, but returned after his father's death, and claimed the right to occupy a room in the house, and to be supplied with board therein.

The learned Judge, at the close of the case, found as follows :—

MEREDITH, J.:—

I perceive nothing in this case to prevent the plaintiff having that which the deed provides he shall have, and which, for a time, for a very good reason, he was willing to do without.

The plaintiff is entitled to the declaration which he asks—that is, he is yet entitled to his rights under the deed: if the defendant be in a position to give, and will give them, he should have them, and nothing more, if not, a reasonable compensation should be allowed in lieu of them. • They are charged upon the land; and, if it be necessary for the purposes of enforcing them, the land

or a competent part, must be sold for their satisfaction from time to time. Judgment.
Meredith, J.

The judgment will go in the usual form in cases of this kind.

The plaintiff is entitled to his costs from the defendant; whether the defendant should have them out of the estate is a matter with which I have not now to deal.

There is no need for a reference as to the amount to be allowed the plaintiff in lieu of his rights, if they be refused to him. I fix the amount at \$3.00 per week.

The defendant moved on notice to set aside the judgment for the plaintiff, and to have it entered in his favour.

In Michaelmas Sittings, December 3rd, 1894, before a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., *Neville*, supported the motion. Under the terms of the deed, the only charge on the land was that of the bed-room in the dwelling-house, but not as to the board. There was only a grant of the board out of the general estate, and it was only to exist as long as the plaintiff resided on the property. It was necessary that the residence should be continuous, and as soon, therefore, as the plaintiff left the land, there was an abandonment of the right. The meaning of the word "Remain," is to continue in a fixed place: Webster's Dictionary, title "Remain." In *Re Moir, Warner v. Moir*, 25 Ch. D. 605, the definition of the words "to reside at," is given, namely, "to be found at the place whenever required." In *Walcot v. Bolfield*, Kay 534, a similar definition is given. The plaintiff never took possession of the room at all. It was necessary that there should be an election in the father's lifetime, and what the plaintiff did constituted an election not to take the room: Elphinstone on Deeds, Black ed., p. 107; White and Tudor's L. C., Black ed., p. 278-9.

W. M. Douglas, contra. Under the terms of the deed the board was made a charge on the land as well as the room.

Argument. The intention was that the charge should exist for the lifetime of the plaintiff. The meaning of the deed was that so long as the plaintiff was resident on the land, that is, while he was actually there, he was to have the use of the bed-room and his board, but there was nothing to prevent his going away at any time, and on his return he would be entitled to claim his right: *Swainson v. Bentley*, 4 O. R. 572; *Millette v. Sabourin*, 12 O. R. 248; *Sweeney, v. Sweeney*, 16 O. R. 92. The charge did not take effect until the father's death, when the plaintiff came and claimed his right; but even if it was in the father's lifetime there never was any abandonment of it.

December 21st, 1894. MACMAHON, J.:—

John Wilkinson having retained a life estate in the lands and premises mentioned in the deed he might have occupied the house and farmed the lands himself. And as Arthur's right to the possession of the property did not accrue until the termination of the father's life estate, I think it clear beyond question that the plaintiff was not entitled to the use of the bed-room, bedding and board during the father's lifetime. Arthur was taking the fee subject to this right of the plaintiff, and until Arthur's estate in remainder became an estate in possession the plaintiff's rights now claimed could not arise.

The plaintiff is to be supplied with board "so long as he shall remain as a resident on said lands;" and I think upon the authorities there is no foundation for the argument that the board does not form a charge upon the lands. See *Swainson v. Bentley*, 4 O. R. 572; *Millette v. Sabourin*, 12 O. R. 248, and *Murray v. Black*, 21 O. R. 372. It is in effect the same as if the grantor or settlor had said, "and to be paid the sum of \$3 per week for his maintenance so long as he shall remain a resident on the said lands."

It was urged that the plaintiff having lived in the house after the execution of the deed of 1884, and having left

and remained absent for several years, he abandoned all his rights under the deed as it was said the deed required his continuous residence in the house.

Judgment.
MacMahon,
J.

The first answer to this argument is, that while residing in the house with Arthur, the plaintiff was a joint tenant with Arthur, in the lands; and, secondly, the plaintiff had no rights under the conveyance during the continuance of the life estate of the father; and thirdly, because there is no period fixed during which he is to use the bed-room. It is left discretionary with him as to whether he will use it constantly, or only periodically, and it is only while so using it that he is entitled to have his board.

This is not like the cases of *Walcot v. Botfield*, Kay 534, and *Warner v. Moir*, *Re Moir*, 25 Ch. D. 605, cited by Mr. Neville, where there was a devisee for life in each case, and the life tenant was required to reside on the estate devised for a certain period during each year, and in case of failure to observe the condition, the estate was devised over.

In Jarman on Wills, 5th ed., p. 900, it is said: "Another condition frequently imposed on a devisee is, that he shall 'reside' in a particular house. The terms of the will are generally such as to leave no doubt that personal residence to some extent is required; but where no period is fixed for the duration of the residence, it is almost impossible to enforce the condition."

The plaintiff takes no estate under the deed: there is no period fixed during which he is required to occupy; and therefore there is no forfeiture created by his not occupying for any period. He is simply to have the use of a bed-room and board while he is a resident on the lands.

The judgment of the trial Judge must be affirmed, and the motion dismissed with costs.

MEREDITH, C. J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

McDERMOTT V. TRACHSEL ET AL.

Assessment and Taxes—Absence of By-law—Leaving Tax Bill on Rate-payer—Demand of Payment—Sufficiency of—55 Vict. ch. 48, sec. 123, sub-sec. 2 (O.).

The mere delivery to a rate-payer, in places other than cities and towns, of the statement of taxes due, is not sufficient evidence of the demand required to be made for the payment thereof, unless a by-law has been passed under the Consolidated Assessment Act, 1892, sec. 123, sub-sec. 2, empowering the collector to take that course.

Statement. THIS was an action for seizure and conversion of goods of the plaintiff, tried before ROBERTSON, J., and a jury, at Stratford, at the Spring Assizes of 1894.

Mabee, for the plaintiff.

Idington, Q.C., for the defendants.

On the finding of the jury the learned Judge entered judgment for the defendants.

The facts fully appear in the judgment of the trial Judge.

May 1, 1894. ROBERTSON, J.:—

This action is for taking away one horse and one buggy, the property of the plaintiff, and disposing thereof; and also for seizing and taking away one lumber waggon and disposing thereof, and depriving the plaintiff of the use and possession of the same.

The defendant Trachsel is the collector of taxes of the township of South East Hope, and the defendant Donaldson is his bailiff; and they say that any thing they did in the premises complained of, was done in discharge of their duties as such, and defendants claim the protection of The Consolidated Assessment Act, 1892; and they say that the plaintiff was and is the husband of one Fanny McDermott,

who was duly assessed for the year 1892, under the said Judgment.
Act, as the owner of lot No. 2, on the north side of Hope Robertson, J.
street, in the village of Tavistock, in the said township,
and had duly imposed upon the said lands the payment of
several rates, etc.; that the collector's roll was duly made
up and delivered to the defendant Trachsel in October,
1892, who thereupon duly demanded of and from the said
Fanny McDermott the payment of the said several rates,
etc., on the 11th November, 1892, which for fourteen days
thereafter she made default in paying; and neglected and
refused to pay; and by reason of such default the defendant
Trachsel, and defendant Donaldson as his bailiff, became
entitled to enter said lands and seize and distrain the goods
and chattels of said Fanny McDermott, or any goods, etc.,
in her possession, or any goods, etc., found on said premises,
the property of, or in possession of any of the occupants of
said premises, and they, the defendants, made the necessary
entry for so doing and the necessary seizures and distress
therefor in accordance with the provisions of the said
Assessment Act, and not otherwise, which are the tres-
passes complained of, etc.

The point in dispute was as to the demand alleged by
defendants for the said taxes; the plaintiff contending
that no such demand was made.

There was an entry in the collector's roll, in the column
for that purpose, that the demand for such taxes was made
on the 11th November, 1892, and the defendant Trachsel
and the said Fanny McDermott, the plaintiff, gave evidence
as to what took place, so that the question left to the jury
was: Did the collector Trachsel, on the day mentioned, or
on any other day more than, or fourteen days before the
said seizure, demand such taxes? The jury did not answer
the question direct, but handed in as their finding a
memorandum in writing in these words: "The jury find
that sufficient notice was given to Mrs. McDermott prior
to the seizure for taxes, meaning verdict for defendants."

Upon this finding, the counsel for plaintiff contended
that the verdict should be entered for the plaintiff, while
the counsel for defendants contended contra.

Judgment. I think, however, that as the jury have added the words
Robertson, J. "meaning verdict for the defendants," I must order judgment to be entered for the defendants, leaving the plaintiff at liberty to apply to the Court to rectify the error, if any.

Judgment will therefore be entered for the defendants with costs.

The plaintiff moved, on notice, to set aside the verdict, and for a new trial.

In Michaelmas Sittings, December 5th, 1894, of the Divisional Court, composed of MEREDITH, C.J., and MACMAHON, J., *Mabee* supported the motion. Under sections 123, 124 of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), no distress for taxes can be levied until fourteen days after the collector has made a demand therefor, or, if so empowered by by-law, has left a written or printed notice with the person taxed, or at his residence. No proof is furnished that any such by-law was passed, and therefore it is essential that a demand should be proved. The mere leaving of the collector's slip with the person taxed is not a demand within the statute. This was expressly held in *Chamberlain v. Turner*, 31 C. P. 460, which was followed in *Carson v. Veitch*, 9 O. R. 706, and in consequence of these decisions the Act was amended authorizing the passing of the by-law making the printed notice or written notice sufficient. The jury do not find that a demand was made fourteen days prior to the distress, but merely that sufficient notice was given to plaintiff prior to the seizure for taxes, and adding that their verdict was for the defendants. This was clearly insufficient. [There were other grounds raised on the argument; but as the judgment does not proceed on them they are not given.]

Idington, Q.C., contra. The question here is, have the jury rendered a verdict upon which judgment can be entered for the defendants. By their verdict they expressly

say that they find for the defendants, and upon such a verdict judgment can properly be entered for them. If, however, they failed to discharge their duty in answering the questions submitted to them, the plaintiff should have called the Judge's attention to it and asked to have had them reconsider their verdict, and by his failure to do this he has waived his right, if any, to now object. The finding here taken with the Judge's charge amounted to a finding that there was a demand made fourteen days prior to the distress, and the evidence clearly shews such a demand. Argument.

December 21st, 1894. MEREDITH, C. J. :—

I have reluctantly come to the conclusion that the finding of the jury was not one that justified the entry of judgment for the defendants, and that there must be a new trial.

The action was brought to recover from the defendant, who is a township collector, damages for an illegal distress for taxes; and the only question which at the close of the case remained to be determined, was, whether or not the defendant had, fourteen days before distraining, made a sufficient demand within the meaning of sub-section 2 of section 123 of the Consolidated Assessment Act, of the payment of the taxes which were payable by the plaintiff's wife.

There was no question as to the defendant having, upwards of fourteen days before the distress was made, left with the plaintiff's wife at her usual residence a statement of the amount of the taxes due by her; but there was a conflict of evidence as to there having been any demand of payment of the taxes other than may be said to have been implied from the delivery of the statement.

There was no evidence to shew that there was any by-law of the municipality in force empowering the defendants to leave with the person taxed, as provided by sub-section 2, a statement of the amount of the taxes.

The action was tried before Robertson, J., and a jury,

Judgment.
Meredith,
C.J.

at the Stratford Assizes; and the jury were asked to say whether the seizure was made before the expiration of fourteen days after the demand of the taxes was made. When the jury returned they announced their verdict in these terms: "We, the jurors in the case of McDermott against Trachsel, believe that sufficient notice was given to McDermott prior to the seizure for taxes, meaning verdict for the defendants."

Upon this verdict being rendered, objection was taken by Mr. Mabee, the plaintiff's counsel, that the finding was practically one that the notice had not been given to the plaintiff's wife, and therefore that the verdict should have been for the plaintiff, while Mr. Idington contended that the verdict was for the defendants, and should be so entered.

After considerable discussion the learned trial Judge decided to record the verdict in the exact language of the jury, which he did; and he subsequently entered judgment dismissing the action.

It is, I think, unfortunate, that the jury were not asked to reconsider or to explain their finding; had that course been taken it is very probable that a result would have been reached that would have rendered this motion unnecessary; but it was not done; and we are now called upon, on a motion by the plaintiff to set aside the verdict and the judgment, to determine what effect, if any, should have been, or should now be given to the finding.

Assuming in favour of the defendants that the case is not one in which the jury were not entitled to give a general verdict, and that the question which the jury was asked to answer was not put to them so as to bring it within section 84 of the Judicature Act, we are of opinion that this verdict cannot be dealt with simply as a verdict for the defendants, coupled as it was with the reason for that verdict, a reason which was not sufficient to justify a finding in the defendants' favour.

The question put to the jury was as to the demand alleged to have been made upon the plaintiff's wife, and a

finding that sufficient notice had been given to the plaintiff, even if that could be taken to mean that a demand had been made upon him within fourteen days before the distress, was not an answer to the question that was put, nor was such a finding material to the issue.

Judgment.
Meredith,
C.J.

There must, therefore, be a new trial, unless, as Mr. Idington contended, we can upon the whole case say that there was no evidence to go to the jury.

If the leaving of the statement of the taxes alone was a sufficient demand of payment we could probably give effect to Mr. Idington's contention; but, if not, the evidence as to a demand sufficient to comply with the Act was conflicting, and we cannot pass upon it; and the case must go down to another trial in order that that question may be determined.

In *Chamberlain v. Turner*, 31 C. P. 460, Wilson, C. J. expressed the opinion that the mere delivery of the statement to the ratepayer, nothing being said or done about it, could not be held to be a proper demand of payment; and that view was approved of and adopted by this Court in the case of *Carson v. Veitch*, 9 O. R. 706; the amendment which has since been made to the section indicates that the Legislature recognized the interpretation placed upon it by the Court to be the correct one. I refer to the amendment which allows the demand to be made by leaving a statement of the taxes, but only in cases where the collector is empowered by by-law of the municipality to take that course.

The appeal must therefore be allowed, and the verdict and judgment set aside, and a new trial granted.

There will be no costs of the last trial or of the appeal to either party.

MACMAHON, J., concurred.

G. F. H.

[QUEEN'S BENCH DIVISION.]

ARGLES v. McMATH.

*Landlord and Tenant—Fixtures—Short Forms Act, R. S. O. ch. 106—
Forfeiture—Assignment for Benefit of Creditors—R. S. O. ch. 143,
sec. 11—Notice—Re-entry—Election—Removal of Fixtures—Time—
Interference—Remedy.*

The term "fixtures" as used in the extended form of the covenants to repair and leave the premises in good repair in a lease made pursuant to the Short Forms Act, R. S. O. ch. 106, includes only irremovable fixtures, which are such things as may be affixed to (e.g., doors and windows) or placed on (e.g., rail fences) the freehold, by the tenant, the property in which passes to the landlord immediately upon their being so affixed or placed, and in which the tenant at the same time ceases to have any property; and does not include removable fixtures, which are such things as may be affixed to the freehold for the purposes of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, or such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant.

The provisions of sec. 11 of R. S. O. ch. 143 do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is therefore enforceable without notice served upon the lessees.

Where the lessor has elected to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purposes of his trade, and has a reasonable time after such election within which to do so.

And where he attempts to do so within a reasonable time, and is prevented by the lessor, the latter is liable to an action for the value.

Judgment of BOYD, C., reversed.

Statement. THIS was an action by the assignee for the benefit of the creditors of Albert H. and George C. Byrnell, the lessees in a lease of certain premises used by them as a general dry-goods store, known as No. 1400, Queen street west, in the city of Toronto, and being the cellar, ground floor, and first floor, less the stairs and partitions on the first floor, against the lessor in the lease, for the wrongful seizure and taking possession of certain chattels specifically set out in a schedule annexed to the statement of claim, but which may be described generally as: (1) shelving and office; (2) brass window fixtures and mirror; (3) awnings; (4) gas fixtures: all put in by the

lessees during the currency of the lease and for the purposes of their business. Statement.

The lease, which was dated 1st April, 1893, for five years from that date, was made in pursuance of the Act respecting short forms of leases, R. S. O. ch. 106, and contained the statutory covenants on the part of the lessees, their heirs, executors, administrators, and assigns, to repair, reasonable wear and tear and damage by fire excepted; that the lessor might enter and view the state of repair; that the lessees would repair according to notice; that they would leave the premises in good repair, wear and tear excepted as aforesaid; and further, that * * if the said lessees should make any assignment for the benefit of creditors * * the then current quarter's rent should immediately become due and payable and the said term should immediately become forfeited and void. Proviso for re-entry by the lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid.

On the 5th February, 1894, the lessees made an assignment to the plaintiff, for the benefit of their creditors, of all their personal property, including the stock of goods on the demised premises, and including fixtures, and all their real estate and all interest therein, with the appurtenances, with a proviso that leasehold estates should not vest until accepted by the plaintiff by notice in writing given to the lessor; and it was thereby declared that the provisions of R. S. O. ch. 124 should not apply to the said assignment.

The plaintiff did not in writing notify the defendant of his intention to accept the lease, but he entered into possession and paid up the arrears of rent to 1st February, 1894, and subsequently, on the defendant claiming the current quarter's rent, he paid a further sum covering the rent due on 1st March following.

On 1st March, 1894, the defendant, through his solicitors, notified the plaintiff that in consequence of the assignment the lease was forfeited and at an end. A few days

Statement. after this the plaintiff informed the defendant that he wished to remove the fixtures, to which the defendant at first assented, but afterwards declined to permit their removal, and claimed to be entitled to them.

On the 9th March, 1894, the defendant, finding a door open, entered and closed up the premises, and refused to deliver up the property claimed.

The articles claimed as fixtures were affixed as follows:—

Shelving: strips about two inches wide were put vertically against the wall and nailed to it, and the bottom was built of one solid shelf, and the other shelves were put on separately on top, each one by itself, and were nailed to the strips.

Office: a platform was placed on the floor and nailed to it, and the office was built on the platform and attached to it, and it stood against the stairway, and two sides of it were nailed to the stairway; it stood about five feet high, and was about seven feet by five or six feet, walled in and open at the top; it contained the safe and books, and the cashier sat in it to receive the cash.

Gas fixtures: these were put in in the same manner as other gas fixtures; the pipes were in place, and they were screwed on to the pipes at the ceiling.

Awnings: brackets were put on with screw nails to the woodwork of the front, and the iron arms, etc., were attached to the brackets; they were of white duck, and were put on with rings to the front of the building, and by taking the screws out of the brackets, they would become detached from the building.

Mirror: this was without a frame; the edge of the window formed one side of it, and a strip of mould was put round the other side and at the top and bottom, to keep it in its place, and the strip of mould was fastened to the wall by small iron nails; the wall was wood, and the mirror occupied only part of the space in the window.

Brass window fixtures: these were put on by brass cups to the ceiling and floor of the window, and the standard set

into the socket, and they had arms on them for the display of goods; they consisted of three brass uprights with the cross-bars and the arms merely set in the sockets. Statement.

These fixtures were all put in by the lessees for their own use and convenience in connection with their dry-goods business and for the purposes thereof.

The action was tried before BOYD, C., at Toronto, on the 25th October, 1894.

Shepley, Q. C., and *Duncan Donald*, for the plaintiff.

William Macdonald, for the defendant.

October 29, 1894. BOYD, C.:—

The lease from the defendant to the insolvents of 1st April, 1893, is under the Act as to short forms, and has the covenants to repair, "reasonable wear and tear and damage by fire and tempest excepted," and to repair according to notice "as aforesaid," and to leave the premises in good repair, "wear and tear excepted as aforesaid." Applying the statute to extend the contract embodied in the brief covenants, we find that the one "to repair" means (*inter alia*) to keep and maintain the "demised premises with the appurtenances in good and substantial repair, and *all fixtures* and things thereto belonging, or which at any time during the said term shall be erected and made, when, where, and so often as need shall be." This has been passed upon by Wilson, C. J., in *Holderness v. Lang*, 11 O. R. 1, who held that under the full text the tenant had the right to put up fixtures and things upon the demised premises during the term, and if he do so, he is bound to keep them in repair equally with the whole of the demised premises as he received them.

Taking the other, "to leave in good repair," that means "to yield up the demised premises, with the appurtenances, together with all buildings, erections and *fixtures* thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted."

Judgment.

Boyd, C.

The next point is, do these words apply to fixtures which have been put up during the term by the tenant, or are they to be limited to fixtures which at the beginning of the term formed part of the demised premises?

The former would appear to be the reasonable inference from the language used, as interpreted by the decision in *Holderness v. Lang*, 11 O. R. 1. If the fixtures put up by the tenant are to be kept in repair equally with the premises as originally demised, it would seem to follow that he must yield up the premises, as added to by him during the tenancy, in good repair; and if so, it would not be competent for him to diminish the premises by removing any of the fixtures so to be kept in repair.

It would be an idle thing to require the tenant to keep the fixtures added by himself in repair during the term, if at the end he could strip them from the premises at his will.

Where one covenanted to repair and keep in repair the premises and all erections, buildings, and improvements which might be erected during the term, and yield up the same in good and sufficient repair, and it appeared that the tenant had put up a verandah, the lower part of which was attached to posts fixed in the ground, it was held by Abbott, J., that the defendant could not remove any part of it: *Penry v. Brown*, 2 Stark. 403.

In brief, if the covenant be to repair, and *yield up* in repair, fixtures erected by the tenant for the purpose of trade cannot be removed at the end of the term: Foa on Landlord and Tenant, pp. 175 and 571.

The gas-fittings or gasaliers are embraced in the term "fixtures:" *Sewell v. Angerstein*, 18 L. T. N. S. 300, *per* Willes, J.

In *Elliott v. Bishop*, 10 Ex. at p. 512, Platt, B., says: "If the tenant, for the enjoyment of his occupation, fixes (grates or gas-fittings) in the house, he might undoubtedly remove them during the term, unless he had contracted to leave them behind." The latter part of the judgment shews that a covenant to preserve and keep in repair "any fixtures"

(and a *fortiori* to yield them up) would be such a contract. Judgment.
 These covenants as to fixtures are not restricted, but extend to "all fixtures," and therefore include such as are personal chattels annexed to the freehold, and which but for the restraint involved in the covenant would be removable by the tenant: see *per Parke, B.*, in the same case at pp. 518, 519. Boyd, C.

All the articles in question here were put up for the more convenient and profitable use of the premises demised, and not merely for the better enjoyment and use of the things themselves as chattels. I am not able to discriminate as to some of them on the line of decision in *Davis v. Jones*, 2 B. & Ald. 165. That case has been doubted: *Wilde v. Waters*, 24 L. J. C. P. at p. 194, by Cresswell, J.: and see in *Amos & Ferard's Law of Fixtures*, 3rd ed., pp. 9, 10.

The present ruling extends to the "shelving" and "office," with its platform, also to the gas-fixtures, mirrors, brass window fixtures, and the outside awnings. All these are affixed to the freehold, and although when brought on were independent personal chattels, yet, being so physically attached by nails or screws, became fixtures within the comprehensive language of the covenant—to be yielded up at the end of the term: see *Burt v. Haslett*, 18 C. B. 162, 893; *West v. Blakeway*, 2 M. & G. 729.

The carpet would, however, be a personal chattel, spread with tacks only for the purpose of keeping it in place and not to attach it to the freehold. The distinction is marked by the Master of the Rolls in *Hutchinson v. Kay*, 23 Beav. 413, who says that to whatever purpose the mill may be applied, the gas-lighting does form a part of it, but the other things "are merely accidental, and no more form a part of the mill than a carpet forms part of a house:" p. 417: see also *Boyd v. Shorrocks*, L. R. 5 Eq. 72.

It is remarkable that the question before me has not been decided in this country—turning as it does on the effect of the covenants in the short form of lease. The result may be a surprise, and I think it is a hardship on the tenant, at

Judgment. all events as to such articles as were independent chattels before being annexed. But it has to be observed that the Ontario Act itself is of English origin, being an adaptation—almost an adoption—of Lord Brougham's much-criticized statute of 1845: 8 & 9 Vict. ch. 124, Imp. The exposition of the covenant to repair is thus expressed in the English Act: "And also will during the said term well and sufficiently repair, maintain, etc., the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney pieces, windows, doors, fastenings, water closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks, and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when, where, and so often as need shall be." And of the covenant to leave in good repair, the extended form is the same as ours, with these words added, after "all buildings, erections, and fixtures," viz., "now or hereafter to be built or erected thereon."

The provincial compilers have omitted these words, but to my mind the legal effect is the same, when the whole instrument is to be construed. Therefore the English law as to fixtures is to be regarded, and the contract embodied in the lease, and the statutory exposition is to be construed as any other document. It is possible that the introduction of the particular words "chimney pieces, doors, locks, keys" in the covenant to repair may reduce the effect of the general words used as to "fixtures," conformably to the much discussed case of *Elliott v. Bishop*, 10 Ex. 496, and in the Exchequer Chamber, *Bishop v. Elliott*, 11 Ex. 113; but it is not necessary to burden oneself now with the examination of that question.

The matter is deserving of legislative consideration as to whether some restriction should not be put upon the general wording of these statutory covenants, so as to make removable all such trade or tenants' fixtures as were before annexation separate personal chattels.

The other articles in dispute which I have not designated fixtures are removable chattels. I do not find upon

the facts that there has been any conversion of them by the landlord. To delivery of these movables the plaintiff is entitled. An action was probably needed to settle the conflicting claims, but there is no such decided success as should carry costs to either—particularly having regard to the nature of the questions discussed.

It is another noteworthy matter that the short forms of Lord Brougham, so universally discredited by English conveyancers, have here formed the standard models everywhere used, though sometimes to the surprise of those who have not carefully estimated the scope of the statutory exponential covenants.

At the Michaelmas Sittings of the Divisional Court, 1894, the plaintiff moved to set aside the judgment in favour of the defendant, in so far as it related to the shelving, office, brass window fixtures, mirror in window, awnings, and gas fixtures, and in so far as it found against any conversion by the defendant, and to have judgment entered in favour of the plaintiff for the value of the whole of the goods, chattels, and fixtures, with costs, including the costs of the motion, upon the following amongst other grounds: (1) The alleged fixtures in respect of which the learned Chancellor found in the defendant's favour, if fixtures at all, were clearly established by the evidence to be of the class known as tenants' or trade fixtures, and, as such, were removable by the tenant or his assigns at any time during the term, or within a reasonable time thereafter. (2) The evidence clearly established that the said alleged fixtures, but for the unlawful interference of the defendant, would have been so removed. (3) Upon the facts established the defendant was clearly guilty of a conversion of the whole of the goods and chattels claimed by the plaintiff, and he should have been held liable to the extent of the value of the whole of the said goods as damages for such conversion. (4) The learned Chancellor erred in holding that the adoption by the parties of the form prescribed by the Act respecting short forms of

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Boyd, C.

Argument. leases, containing the statutory covenants to repair and leave the premises in repair, amounted to a contractual abandonment by the tenants of their legal rights in respect of tenants' or trade fixtures. (5) The goods and chattels in respect of which judgment was in the defendant's favour were not, or many of them were not, fixtures at all, and never lost their character of mere chattels, or became affixed to the freehold so as to become part thereof.

November 20, 1894. The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J.

Shepley, Q. C., for the plaintiff. The case of *Holderness v. Lang*, 11 O. R. 1, does not apply; it was really an action of waste. The dictum of Wilson, C. J., in that case does not go any further than the decision of the Judge at the trial. There is no difference between *Bishop v. Elliott*, in the Exchequer Chamber, 11 Ex. 113, and this case. The words following in the English Act are to be construed *ejusdem generis*; and so in our Act the word "fixtures" is to be construed as *ejusdem generis* with "premises," "appurtenances," which are clearly the landlord's, and therefore "fixtures" means landlord's fixtures. I refer to *Burnside v. Marcus*, 17 C. P. 430. Assuming that a strict construction requires the Court to support the Chancellor's interpretation of the Act, then the doctrine of *communis error* applies: *Brownlie v. Campbell*, 5 App. Cas. 925, per Lord Blackburn, at pp. 948-9. Then it may be argued on the other side that the term was forfeited, and the landlord had the right to take the fixtures. But the tenant has a reasonable time after forfeiture to remove the fixtures; and there was no election by the landlord to forfeit: *Linton v. Imperial Hotel Co.*, 16 A. R. 337. Notice was served on the assignee, but not on the tenants; the lease did not pass under the assignment; and the word "lessee" cannot be extended further than to an assignee of the lease, certainly not to the assignee of the goods on the premises. The exception in the statute (R. S. O. ch. 143, sec. 11, sub-sec. 6 (a)) does not apply to an assignment for the benefit of creditors working a forfeiture. Therefore there was no

valid forfeiture. Then as to the remedy. The defendant converted all the goods on the premises, those which were not fixtures in any sense at all, as well as those now in dispute, and he is at least liable for the former. The Chancellor held that because the demand was for everything, the plaintiff should not succeed. Upon the weight of evidence the defendant wanted to keep all the goods—tables, chairs, and everything. Argument.

William Macdonald, for the defendant. Originally everything affixed became part of the freehold. All these things were affixed; the mode of annexation and the purpose for which they were annexed were not disputed. The purpose was for use during the tenancy, and cannot be considered merely temporary: *Amos & Ferard's Law of Fixtures*, 3rd ed., pp. 15, 19. I submit it is not a question of intention: *ib.* p. 26. The things are affixed and became part of the freehold: *ib.* p. 393. If they are part of the freehold, the tenant is precluded from exercising the right of removal: *Foa on Landlord and Tenant*, p. 175. "Fixtures" is not *ejusdem generis* with "premises" and "appurtenances," but with "things:" *ib.* pp. 570-1; *Naylor v. Collinge*, 1 Taunt. 19. The only right the tenant has is to remove fixtures in proper time; until he removes them, they remain part of the freehold: *Meux v. Jacobs*, L. R. 7 H. L. at pp. 490, 491; *Scarth v. Ontario Power and Flat Co.*, 24 O. R. 446. On the second point, the law is that fixtures must be removed while the tenant is still in possession, and during the term: *Foa*, p. 573; *Amos & Ferard*, pp. 129-30. As to the right of forfeiture, see *Amos & Ferard*, pp. 139-40; *Minshall v. Lloyd*, 2 M. & W. 450; *Weeton v. Woodcock*, 7 M. & W. 14; *Pugh v. Arton*, L. R. 8 Eq. 626. If the right does not arise by reason of the assignment, then by assignment and sub-letting without leave. The right to remove is an incident of the estate. There was no conversion of the other articles. As to conversion, see *Addison on Torts*, 7th ed., p. 498; *Simmons v. Lillystone*, 8 Ex. at p. 442.

Shepley, in reply.

Judgment. February 23, 1895. The judgment of the Court was
Armour, C.J. delivered by

ARMOUR, C. J. :—

The covenants to repair and to leave the premises in good repair contained in the lease from the defendant to A. H. and G. C. Byrnell, which was made in pursuance of the Act respecting short forms of leases, are in their extended form in the said Act as follows :—

“ And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made, when, where, and so often as need shall be.”

“ And further, the lessee will, at the expiration, or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted.”

And the first question to be decided is : With what meaning is the word “ fixtures ” used in these covenants ?

[The learned Chief Justice then referred at length to the definitions of the word “ fixtures ” contained in the following works and cases : Imperial Dictionary ; Webster’s Dictionary ; Worcester’s Dictionary ; Century Dictionary ; Abbott’s Law Dictionary ; Wharton’s Law Lexicon, 9th ed. ; Sweet’s Law Dictionary ; Brown’s Law Dictionary, 2nd ed. ; Bouvier’s Law Dictionary ; Burrill’s Law Dictionary ; 2 Sm. L. C., 9th ed., p. 202 ; Broom’s Legal Maxims, 6th ed., p. 391 ; Washburn on Real Property, 5th ed., p. 22 ; Woodfall on Landlord and Tenant, 14th ed., p. 641 ; Gibbons on Fixtures, p. 15 ; Grady on Fixtures, p. 1 ; Amos & Ferard’s Law of Fixtures, 3rd ed., p. 1 ; Brown on Fixtures, p. 1 ; Hill on Fixtures, p. 9 ; Ewell on Fix-

tures, p. 1; Tyler on Fixtures, pp. 35, 36; Abbott's Law Judgment. Dictionary, p. 504; *Teaff v. Hewitt*, 1 Ohio St. R. 511; *Armour, C.J.* *Hallen v. Runder*, 1 Cr. M. & R. 266 (1834), *per* Parke, B.; *Minshall v. Lloyd*, 2 M. & W. 450 (1837), *per* Parke, B.; *Sheen v. Rickie*, 5 M. & W. 175 (1839), *per* Parke, B.; *Wiltshear v. Cottrell*, 1 E. & B. 674 (1853), *per* Lord Campbell, C.J., and Coleridge, J.; *Ex p. Barclay*, 5 DeG. M. & G. 403 (1855), *per* Lord Cranworth, L.C.; *Parsons v. Hind*, 14 W. R. 860 (1866), *per* Blackburn, J.; *Climie v. Wood*, L. R. 3 Ex. 257 (1868), *per* Kelly, C.B.; *S. C.*, L. R. 4 Ex. 328 (1869), *per* Willes, J.; *Holland v. Hodgson*, L. R. 7 C. P. 328 (1872); *Bain v. Brand*, 1 App. Cas. 762 (1876); *Ex p. Willoughby D'Eresby*, 29 W. R. 527 (1881), *per* James, L.J.

The learned Chief Justice then continued :]

No fixtures *eo nomine* were demised by the lease in question, and the "fixtures and things" referred to in the covenant to repair, "which at any time during the said term shall be erected and made," include only fixtures and things which shall be erected and made by the lessee, as was pointed out in *Holderness v. Lang*, 11 O. R. 1.

In dealing with the case in judgment I put aside, therefore, any question respecting fixtures erected and made by a landlord, and deal only with fixtures erected and made by a tenant.

And as to such fixtures, I think it plain from the citations and decisions above quoted and referred to, that such fixtures are properly divisible into two general classes, namely, irremovable fixtures and removable fixtures.

The former class comprises all such things as may be affixed to the freehold, the property in which passes to the landlord immediately upon their being affixed, and at the same time the tenant ceases to have any property in them, such, for example, as doors and windows; and all such things as may be placed on the freehold, although not affixed to it save by their own weight, the property in which passes to the landlord immediately upon their being so placed, and the tenant at the same time ceases to have

Judgment. any property in them, such, for example, as ordinary rail
Armour, C.J. fences.

The latter class comprises all such things as may be affixed to the freehold for the purposes of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, and which are neither lands under the 4th section nor goods under the 17th section of the Statute of Frauds: *Lee v. Gaskell*, 1 Q. B. D. 700: but may be sold under execution, and which the tenant may remove at any time during his term, or it may be within a reasonable time after its expiration; and all such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant, and which remain chattels and may be removed by the tenant at any time.

These two classes are quite distinct, and the term "fixtures" is properly applicable to the first class, for the fixtures in that class are fixtures in the primary sense of the term.

The fixtures in the second class are fixtures only in a secondary sense of the term; but they have acquired, but not exclusively, the name of fixtures, although it can hardly be said to be an appropriate name for them.

The term "fixtures" as used in the covenants to repair and to leave the premises in good repair in the lease in question is, in my opinion, so used only in the primary sense of the term, and includes, therefore, only fixtures of the first class, and does not include any fixtures of the second class.

It cannot, in my opinion, have been the intention of the Legislature, in prescribing a form of lease for general use, to provide that where a tenant affixed things to the freehold for the purposes of trade, or of domestic convenience, or ornament, or for their temporary or more convenient use, he should keep such fixtures in repair, and should surrender them to the landlord at the end of the term.

And if the Legislature uses an ambiguous term, which

the term "fixtures" was said by Kelly, C. B., and James, L. Judgment.
J., to be—a term capable of two meanings—the Court Armour, C.J.
should adopt that meaning which will work the least
injustice.

"Where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions:" *per* Earl Cairns in *Hill v. East and West India Dock Co.*, 9 App. Cas. at p. 456: see also *Phillips v. Phillips*, L. R. 1 P. & D. 169; *The R. L. Alston*, 8 P. D. 5.

"A lease ought not, I think, to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels unless such an intention is clearly expressed:" *per* Turner, L. J., in *Duke of Beaufort v. Bates*, 3 DeG. F. & J. 381, 390.

In *Dean v. Allalley*, 3 Esp. 11, the covenant was that the defendant should leave all the buildings which then were, or should be erected on the premises during the term, in repair, etc. Lord Kenyon said: "If a tenant will build upon premises demised to him, a substantial addition to the house, to add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord: but the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so held in the case of cider-mills, and in other cases; and I shall not narrow the law, but hold erections of this sort (Dutch barns), made for the benefit of trade, or constructed as the present, to be removable at the end of the term." *Gibbs* contended that by the express words of the covenant, the tenant was to leave all erections made on the premises at the end of the term. Lord Kenyon.—"I am aware of the full extent of that, and not quite sure that it concludes the question. It means that the tenant

Judgment. shall leave all those buildings which are annexed to and Armour, C.J. become part of the reversionary estate."

In *Holbrook v. Chamberlin*, 116 Mass. 155, the covenant by the tenant was to "deliver up the premises and all future erections and additions to or upon the same," to the lessor at the end of the term, "in as good order and condition as the same now are or may be put into by the lessor," and the Court said (p. 162): "The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order 'all future erections or additions' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to—putting such erections and additions upon the same footing, in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term."

In *Naylor v. Collinge*, 1 Taunt. 19, the things removed were buildings coming within the very words of the covenant, and yet such of them only as were affixed to the freehold, and not such as rested upon blocks, were held to be included. In all the other cases cited for the defendant upon this point, the covenant either expressly named the fixtures or comprised all "improvements."

In *Elliott v. Bishop*, 10 Ex. 496, and *Bishop v. Elliott*, in error, 11 Ex. 113, the covenant was to deliver up the demised premises "together with all locks, keys, bars, bolts, marble and other chimney pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which should at any time during the term be fixed or fastened to the said demised premises," and the Court held that the "locks, keys, bars, bolts, marble and other chimney pieces, foot-paces, and slabs," were all fixtures irremovable by the tenant, and that the "other fixtures and articles in the nature of fixtures" must be limited to fix-

tures of the same kind, that is, irremovable fixtures, according to the maxim "*copulatio verborum indicat acceptationem in eodem sensu*:" see Broom's Legal Maxims, 6th ed., p. 541. Judgment.
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And I think that in the lease in question the coupling of the words "buildings, erections, and fixtures," ought to be attended with the same result: *Sumner v. Bromilow*, 34 L. J. Q. B. 130.

The cases cited of *Dean v. Allalley*, 3 Esp. 11, *Holbrook v. Chamberlin*, 116 Mass. 155, and *Elliott v. Bishop*, 10 Ex. 496, 11 Ex. 113, to which may be added *Sumner v. Bromilow*, 34 L. J. Q. B. 130, and *Cosby v. Shaw*, 23 L. R. Ir. 181, all shew the leaning of the Courts against such a construction of a lease as will deprive the tenant of his removable fixtures.

The assignment made by the lessees for the benefit of their creditors to the plaintiff was not a breach of the covenant in the lease not to assign or sub-let without leave, for, by the provisions of the assignment, leasehold estates were not to vest until accepted by the assignee by a notice in writing given to the lessor or lessors, and this notice was never given: *Doe d. Lloyd v. Powell*, 5 B. & C. 308.

But, under the special provision made in the lease, the term created by the said lease immediately became forfeited and void by reason of the making of the said assignment by the said lessees.

But it was contended that this forfeiture was not enforceable by action or otherwise, unless and until notice was served upon the lessees in pursuance of the terms of the 11th section of the Act R. S. O. ch. 143, and that, as no such notice had been served upon the lessees, the entry of the defendant upon the demised premises was wrongful; and it was contended that this notice was necessary because sub-sec. 6 of sec. 11 provided that "this section does not extend—(a) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking

Judgment. in execution of the lessee's interest;" that making an Armour, C.J. assignment for the benefit of creditors was not within the terms of sub-sec. 6 (a); and that the maxim *expressio unius est exclusio alterius* applied; and that notice should have been given as prescribed by sec. 11 before the forfeiture was enforceable by entry.

But the maxim *expressio unius est exclusio alterius* is not of universal application, and applies with a force differing in different cases: *Saunders v. Evans*, 8 H. L. Cas. 721, at p. 729; *London Joint Stock Bank v. Mayor of London*, 1 C. P. D. 1, at p. 17; *The Amalia*, 32 L. J. P. & M. 191; Broom's Legal Maxims, 6th ed., p. 606; Maxwell on Statutes, 2nd ed., p. 379.

And, in my opinion, the covenants and conditions expressly mentioned in sub-sec. 6 (a) are so mentioned as illustrations, and not to the exclusion of other covenants and conditions of a like nature.

And it is apparent from a reading of the whole of sec. 11 that proper effect can only be given to it by holding that it does not extend to a forfeiture such as the one in question, for the prescribed notice requires the lessee to remedy the breach occasioning the forfeiture, if the breach is capable of remedy, and in any case requires the lessee to make compensation in money for the breach, and the breach occasioning the forfeiture in question is incapable of remedy, and incapable of being compensated for in money, and the forfeiture is one in respect of which the Court cannot grant relief.

Had then the lessees, after the forfeiture, and after the lessor had elected to re-enter for such forfeiture, the right, while they remained in possession of the demised premises, to remove the fixtures in question, and had they a reasonable time after such election by the lessor within which to remove the fixtures in question?

In *Poole's Case*, 1 Salk. 368, it was held that a tenant during the term might remove fixtures which he had set up in relation to trade, "but after the term they become a gift in law to him in reversion, and are not removable."

In *Penton v. Robart*, 2 East 88, it was held that a tenant Judgment.
 who still remained in possession of the demised premises Armour, C.J.
 after the time had expired, had a right to remove fixtures
 which he had set up for the purposes of his trade, Lord
 Kenyon, C. J., saying: "Here the defendant did no more
 than he had a right to do; he was in fact still in possession
 of the premises at the time the things were taken away,
 and therefore there is no pretence to say that he had aban-
 doned his right to them."

In the same case at *nisi prius*, 4 Esp. 33, Lord Kenyon,
 C. J., said: "Where the tenant has by law a right to carry
 away any erections, or other things, * * the inclina-
 tion of my mind is that he has a right to come on the
 premises, for the purpose of taking them away."

In *Minshall v. Lloyd*, 2 M. & W. 450, Parke, B., said
 (p. 460): "Here there is no doubt that the steam-engines
 were left affixed to the freehold after the expiration of
 the term, and after the plaintiffs had any right to con-
 sider themselves tenants; and I am of opinion that
 trover is not maintainable for them."

In *Mackintosh v. Trotter*, 3 M. & W. 184, Parke, B., said,
 "that the tenant has the right to remove fixtures of this
 nature during his term, or during what may, for this pur-
 pose, be considered as an excrescence on the term."

In *Weeton v. Woodcock*, 7 M. & W. 14, Alderson, B.,
 said (p. 19): "The rule to be collected from the several
 cases decided on this subject seems to be this, that the
 tenant's right to remove fixtures continues during his
 original term, and during such further period of possession
 by him, as he holds the premises under a right still to
 consider himself as tenant."

In *Heap v. Barton*, 12 C. B. 274, Jervis, C. J., said:
 "The general principle which has been so elaborately dis-
 cussed, is one of great interest, and not without difficulty.
 The courts seem to have taken three separate views of the
 rule,—first, that fixtures go, at the expiration of the term,
 to the landlord, unless the tenant has during the term
 exercised his right to remove them,—secondly, as in *Penton*

Judgment. *v. Robart*, 2 East 88, that the tenant may remove the fixtures notwithstanding the term has expired, if he remains in possession of the premises,—thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, viz., that the tenant continues to hold the premises under a right still to consider himself as tenant.”

In *Roffey v. Henderson*, 17 Q. B. 574, Patteson, J., said: “But the general principle is that where the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenant’s fixtures, may remove them during the term, or during such time as he may hold possession after the term in the capacity of a tenant.”

In *Stansfeld v. Mayor of Portsmouth*, 4 C. B. N. S. 120, an exhaustive argument was had, and Williams, J., said (p. 131): “A number of questions of no little difficulty have been raised in the course of the argument, as to the right of a tenant to remove fixtures at the determination of his term, and as to the period of time when he must exercise his right to disannex them from the freehold. A good deal of discussion has also taken place as to the effect of a determination of the term by the act of the tenant himself,—whether he puts himself in a different position as to his right of removal where the tenancy has been determined by a forfeiture. But, in the view we take, it is unnecessary to determine any of these points.”

In *Leader v. Homewood*, 5 C. B. N. S. 546, Willes, J., said (p. 553): “The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures which are usually called ‘tenants’ fixtures,’ is by no means clearly settled. According to the older authorities, the rule was that he must sever them during the term. But in *Penton v. Robart*, 2 East 88, it appears to have been considered that the severance might be made even after the expiration of the tenant’s interest, if he has not quitted possession. However, in *Weeton v. Woodcock*, 7 M. & W. 14, the rule was laid down that the tenant’s right continues only during his original term, and ‘such further

period of possession by him as he holds the premises under a right still to consider himself as tenant.' It is, perhaps, not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant." Judgment.
Armour, C.J.

In *London Loan and Discount Co. v. Drake*, 6 C. B. N. S. 798, Williams, J., said (p. 810): "It is fully established that the right of the lessee to remove fixtures continues only during the term, and during such further period of possession by him as he holds under a right still to consider himself as tenant."

In *Parsons v. Hind*, 14 W. R. 860, Blackburn, J., treats fixtures of the class usually called tenants' fixtures as removable within a reasonable time.

In *Climie v. Wood*, L. R. 4 Ex. 328, Willes, J., said: "Lastly, things may be annexed to land, for the purposes of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a reasonable time after its expiration."

In *Ex p. Stephens*, 7 Ch. D. 127, James, L. J., said: "The law is clearly settled that the right of a tenant to fixtures is a qualified right. It is a right to have the fixtures if he removes them during his term, or during a certain time after its expiration, something which may be called an enlargement of the term, or, to use the words of Baron Parke, an excrescence on the term, during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord."

In *Ex p. Brook*, 10 Ch. D. 100, Thesiger, L. J., said (p. 109): "It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for

Judgment. such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy."

In *Ex p. Willoughby D'Eresby*, 29 W.R. 527, James, L. J., said (p. 528): "It appears to us, on consideration, that in our judgment in this case we stated, or might be thought to have stated, some propositions in wider and more general terms than it was necessary or desirable to state. If and when the simple case should arise of a tenant having removable fixtures continuing his possession under a new or extended term, we desire to hold ourselves perfectly free to decide whether he retains his right of removal during such continued or continuous possession, unfettered by anything said in this case."

See also *Saint v. Pilley*, L. R. 10 Ex. 137; *Moss v. James*, 37 L. T. N. S. 715, 38 L. T. N. S. 595.

In *Lyde v. Russell*, 1 B. & Ad. 394, the tenant had quitted the premises and the landlord had re-entered; in *Davis v. Eyton*, 7 Bing. 154, the landlord had re-entered; and in *Pugh v. Arton*, L. R. 8 Eq. 626, the landlord had re-entered and was forcibly ejected; these cases, therefore, do not determine the questions here presented; and *Pugh v. Arton* was cited in *Ex p. Stephens*, 7 Ch. D. 127, and did not affect the opinions expressed in that case and in the case of *Ex p. Brook*, 10 Ch. D. 100, above quoted.

Reliance was placed upon what was said by Lord Hatherley in *Meux v. Jacobs*, L.R. 7 H. L. 481, at p. 490, but Lord Hatherley was there only stating the general rule, and was not professing to deal with such questions as here presented, and was not considering or controverting the decisions and dicta to which I have above referred; and the same may be said of the remarks made by Lord Chelmsford in *Bain v. Brand*, 1 App. Cas. 762, at p. 772; and both these cases

were before the cases of *Ex p. Stephens* and *Ex p. Brook*, ^{Judgment.} and the Court of Appeal in the latter cases does not ^{Armour, C.J.} appear to have considered the remarks made by Lords Hatherley and Chelmsford as decisive of these questions.

In *Wake v. Hall*, 8 App. Cas. 195, at p. 210, Lord Bramwell, as I take it, indicated his opinion that a tenant has a reasonable time after the determination of the term within which to remove his fixtures. He said: "Further I am of opinion, if it were necessary to decide it, that the principle on which a tenant may remove trade fixtures, would, if the defendants were tenants, justify the removal of these buildings; and that the defendants cannot be in a worse position than such tenants * *. Lastly, it was contended that if the defendants might remove these buildings, it must be during the mining. But I am clear that they had a reasonable time afterwards in which to do it."

Penton v. Robart, 2 East 88, has never been overruled, and I think that it and the other cases cited shew that where a term has come to an end by effluxion of time, the tenant has the right, while he remains in possession of the demised premises, to remove his fixtures, and has a reasonable time after the end of the term within which to remove such fixtures; and if he can do so in such case, I can see no good reason why he should not be at liberty to do so, where the landlord has elected to re-enter for a forfeiture. It is true that the forfeiture arises from the act of the tenant himself, but whether the landlord will take advantage of it or not is entirely at his election, and if the tenant, after such election, be not at liberty to remove his fixtures, the act of the tenant which occasions the forfeiture will not only deprive him of the residue of his term, which it is right it should, for such was his agreement, but will also deprive him of his fixtures, which was not his agreement, which would be unjust. If the termination of a tenant's term were originally uncertain, the tenant, upon its termination, would have a reasonable time thereafter within which to remove his fixtures: *Oakley v. Monck*, L. R. 1 Ex. 159, at p. 164.

Judgment. In the case of a tenancy at will, if the tenant sows grain Armour, C.J. and the landlord determines the tenancy, the tenant is entitled to reap the grain and remove it, with free ingress and regress for that purpose: Coke upon Littleton, sec. 68. And in the case of such a tenancy and the determination thereof by the landlord, the tenant shall have free entry, egress, and regress by reasonable time to take away his goods: Coke upon Littleton, sec. 69. And in the case of such a tenancy and the determination thereof by the landlord, the tenant would, in my opinion, have a reasonable time after such determination within which to remove his fixtures: *Cornish v. Stubbs*, L. R. 5 C. P. 334.

In *Antoni v. Belknap*, 102 Mass. 193, where a lease was given by an agent without sufficient authority, during the absence of the owner, and was repudiated by the owner on his return, the Court said: "The defendants' tenancy, under the lease from Harvey, being terminated by the return of Joseph Antoni and his demand of possession, they became mere tenants at sufferance, entitled to such reasonable time to remove themselves and their property from the premises as the nature and circumstances of the case required," the property in this case being an ice-house which the defendants had put up for the purposes of their trade.

And if, as held in this case, a tenant at sufferance has a reasonable time within which to remove his fixtures, the lessees in this case, after the election to forfeit and before re-entry, became and were tenants at sufferance.

Stansfeld v. Mayor of Portsmouth, 4 C. B. N. S. 120, and *Sumner v. Bromilow*, 11 Jur. N. S. 481, were cases of forfeiture, but provision was made in the leases for the lessees removing the fixtures at the end or other sooner determination of the term, and the Court held that the lessees had a reasonable time after the expiration of the term in which to remove the fixtures, and in the latter case the Court intimated that the reasonable time to be allowed was to be calculated from the time the lessees received notice of the lessor's intention to re-enter.

The conclusion at which I have arrived is that the lessees, after the forfeiture and after the lessor had elected to re-enter for such forfeiture, had the right, while they remained in possession of the demised premises, to remove the fixtures in question, and had a reasonable time after such election by the lessor within which to remove the said fixtures. Judgment.
Armour, C. J.

And I find that the lessees, after the forfeiture and after the lessor had elected to re-enter for such forfeiture and before re-entry, and while they still remained in possession of the demised premises, and within a reasonable time after such election, by their assignee and appointee, their servants and agents, attempted to remove the said fixtures, and were prevented from so doing by the lessor; and I determine that by so doing the lessor made himself liable to an action for the value of the fixtures: *London Loan and Discount Co. v. Drake*, 6 C. B. N. S. 798.

The fixtures in question were all put up by the lessees for the purposes of their trade, if not for the more convenient use of them as chattels, and as between landlord and tenant were clearly removable.

As to the shelving and office: *Guthrie v. Jones*, 108 Mass. 191; *Benson v. Wallis*, 115 Mass. 156; *Kimball v. Grand Lodge*, 131 Mass. 59; *Birch v. Dawson*, 2 A. & E. 237.

As to the brass window fixtures and mirror, they might well be said to be affixed for their more convenient use as chattels, and to have never lost the quality of chattels, but in any event they were put up for the purposes of trade, and were removable: *Beck v. Rebow*, 1 P. Wms. 94; *Birch v. Dawson*, 2 A. & E. 37; *Hellawell v. Eastwood*, 6 Ex. 295, at p. 313; *Regina v. Lee*, L. R. 1 Q. B. 241, at p. 254; *Climie v. Wood*, L. R. 4 Ex. 328, at p. 329; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382, at p. 396; *Parsons v. Hind*, 14 W. R. 860, at p. 861; *Holland v. Hodgson*, L. R. 7 C. P. 328, at p. 335; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38.

Judgment. As to awnings : *Devin v. Dougherty*, 27 How. Pr. 455.
Armour, C.J. As to gas fixtures. In the United States they are sometimes held to be chattels : *Guthrie v. Jones*, 108 Mass. 191 ; *Towne v. Fiske*, 127 Mass. 125 ; *Lawrence v. Kemp*, 1 Duer 363 ; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38.

In England they are held to be removable fixtures : *Bishop v. Elliott*, 10 Ex. 496.

The value of the goods and fixtures mentioned in the statement of claim I find to be \$507.15, and the proper order, I think, to make under the circumstances will be to order judgment for the plaintiff for this sum, to be reduced to a nominal sum upon the defendant delivering to the plaintiff, at the demised premises, the said goods and fixtures in as good order as they were when they were attempted to be removed, and paying the costs of this litigation.

E. B. B.

[COMMON PLEAS DIVISION.]

REGINA EX REL. MOORE V. NAGLE.

Public Schools—High Schools—Vacancy in Board of Trustees—Appointment to Fill Vacancy—54 Vict. ch. 57, secs. 11, 12 (O.).

In a high school board of a high school district constituted under sec. 11 of 54 Vict. ch. 57 (O.), a vacancy occurred by reason of the expiration of the term of office of one of the trustees appointed by a town, whereupon the town council passed a by-law appointing the plaintiff to fill the vacancy. At a subsequent meeting, in the absence of any of the causes provided for by the Act, namely, death, resignation or removal from the district, etc., the council passed a by-law amending their previous by-law by substituting the name of the defendant for that of the plaintiff:—

Held, that the plaintiff was duly appointed to fill the vacancy, and that he was entitled to the seat, and the subsequent appointment of the defendant was illegal.

THIS was an information in the nature of a *quo warranto* Statement. to try the right of the defendant Thomas L. Nagle, to take his seat and exercise the office of high school trustee for the high school district of Carleton Place.

The information was heard before BOYD, C., at Ottawa, on January 21st, 1895.

The facts were as follows: The high school district of Carleton Place is composed of the municipality of Carleton Place, in the county of Lanark, and the high school board for the said district is composed of six trustees, three appointed by the council of the county of Lanark, and three by the council of the town of Carleton Place, under sec. 11 of the High School Act, 54 Vict. ch. 57 (O.).

A vacancy having occurred in the board by the retirement, in the regular course, of the said Thomas L. Nagle, one of the trustees appointed by the council of the town of Carleton Place, according to the provisions of the High School Act, that council, on the 15th of January, 1894, passed a by-law, number 307, appointing John Moore to fill the vacancy.

On the 15th of February, 1894, the council of the town of Carleton Place passed another by-law, number 308, whereby they purported to amend by-law number 307, by substi-

Statement. tuting the name of the defendant Thomas L. Nagle for that of John Moore, where it appeared in by-law number 307.

After the passing of by-law number 308, the clerk of the municipal council of the town of Carleton Place, returned the name of Thomas L. Nagle to the board of high school trustees as the person appointed by the council to fill the vacancy.

On the 7th of February, John Moore presented himself at the meeting of the high school board held on that day, being the first meeting of the board for the year, and claimed and asserted his right to be seated at the board, and at the same time submitted a duly authenticated copy of the by-law passed by the council on the 15th day of January, in evidence of his right. The board, however, refused to recognize his right to the seat, or to permit him to take his seat or to participate in the proceedings of the board, but accepted Thomas L. Nagle as the person entitled to the seat, and Nagle assumed his seat at the board, participated in the proceedings, and took upon himself and assumed the duties of a member of the board. The board never received any notification from the council or the town clerk, of the appointment of anyone as high school trustee to fill the vacancy other than Thomas L. Nagle.

McVitty, for the plaintiff.

Gorman, for the defendant.

January 25, 1895. BOYD, C.:—

Section 12 of the High Schools Act, 1891, 54 Vict. ch. 57 (O.), provides for two classes of vacancies, one of which may be called "periodical," arising every year on the retirement of the outgoing trustee; the other may be called "occasional" (see 37 Vict. ch. 27, sec. 56 (O.)), arising from various causes (*e.g.*, death, resignation, removal from the district, etc.), during the term of office. The vacancy to be filled in this case was caused by the annual retire-

ment of one of the high school trustees, and that vacancy was duly filled by the appointment by by-law of the plaintiff Moore, at the first meeting of the council on 15th January, 1895. There being no vacancy of the trusteeship held by Moore created by death, resignation, removal from the locality or otherwise, the council proceeded at a subsequent meeting on the 5th February, to amend the former by-law by substituting therein the name of T. L. Nagle, for that of John Moore. This ostensible amendment was, in fact, the assuming to discharge John Moore from office and to appoint instead of him the defendant Nagle. There was no vacancy to be filled unless it be taken that the effect of the by-law was to create a vacancy. But that cannot be so lightly done where the incumbent is qualified and willing to act. If there is cause for vacating the seat, the Act contemplates that the ordinary course should be observed, viz., a declaration that for cause, such a vacancy has occurred, upon which it is competent to fill the office by another appointment: see sections 46 and 47. The plaintiff was appointed trustee for the term of three years, by the by-law of January, and it was not competent for the municipal council to treat him as holding office at pleasure, which would be the result if the second by-law assuming to appoint Nagle, is valid. The tenure of the office of school trustee being fixed by law, an appointment once formally and properly made, remains till a vacancy is created in due course of law. The body which appoints cannot, in such a case, arbitrarily change what has been done. The power to appoint, in other words, was exercised and exhausted in the choice of Mr. Moore, and he must remain in the office during his term, unless earlier legally disqualified and removed.

The relator is entitled to judgment of ouster, and to have his costs.

Judgment.

Boyd, C.

G. F. H.

[CHANCERY DIVISION.]

DUFTON V. HORNING.

Lien—Mechanics' Lien—Prior Mortgage—Jurisdiction of Master under 53 Vict. ch. 37.

Under the "Act to simplify proceedings for enforcing Mechanics' Liens," 53 Vict. ch. 37 (O.), the remedy of a lien holder as against a mortgagee is confined to the increased value provided by sec. 5 sub-sec. 3 of R. S. O. ch. 126, and he cannot question the priority of the mortgage.

The name of the town and county in which a lien holder resides is a sufficient address under sec. 11 of 56 Vict. ch. 24 (O.).

Statement.

THIS was a proceeding under 53 Vict. ch. 37 (O.), entitled "an Act to simplify the procedure for enforcing Mechanics' Liens," and was begun on the 7th January, 1895, by the filing of a statement of claim under the 2nd section of the Act.

The plaintiff Dufton claimed to be entitled to a lien for \$345.41, and the plaintiffs Samuel and George Pook claimed to be entitled to a lien for \$52.50 against the defendant Horning as owner, and the defendant John B. Young, his assignee. The work of the plaintiffs, the Pooks, was alleged to have been completed on 17th December, 1894, that of the plaintiff Dufton on 5th December, 1894. On the 19th December, 1894, the plaintiff Dufton registered his claim to a lien in the registry office, and on 24th December, 1894, the plaintiffs the Pooks, registered their claim.

On 22nd January, 1895, the local Registrar made an order amending the statement of claim by adding as a party defendant Mary Stewart Malloch, who had become mortgagee of the lands during the progress of the work, and by adding to the prayer of the statement of claim a clause asking for a declaration that her mortgage should be postponed to the liens of the plaintiffs upon the ground that the advances upon it were made with notice of the claims of the lienholders and without obtaining the declaration required by sec. 6 of 56 Vict. ch. 24.

On the 25th January, 1895, the Local Master made a

finding, upon dispute notes filed by the defendant Horning and by Mrs. Malloch, that the plaintiffs were entitled to liens upon the property in question. Statement.

On 4th February, 1895, Mrs. Malloch moved by way of appeal from the order adding her as a party, and from the finding in the plaintiffs' favour, before STREET, J., sitting in Chambers, upon the ground that the claims made were not registered against her interest in the lands: that the order to amend charging her as if she had been originally a party defendant should not have been made; and that the claims to liens were not registered in the form required by the Mechanics' Lien Act and amendments thereto.

February 4th, 1895. *W. H. Blake*, for the appeal.

Ambrose, for the defendant Young.

Furlong, for the plaintiffs.

February 6th, 1895. STREET, J.:—

At the argument I disposed of the objections to the form of the claims of lien which were registered, excepting the fifth objection, which was that neither of the claims registered by the plaintiffs gives an address at which notices and papers may be served as required by 56 Vict. ch. 24, sec. 11 (O.).

That section is as follows: "Every claim of lien shall give an address at which all notices and papers may be served, and service of any notice or paper may be effected by sending the same by registered letter post to the address so given."

In the claim registered by Dufton he describes himself as "of the city of Hamilton, in the county of Wentworth," and the Pooks describe themselves in their claim in the same way.

I cannot, under these circumstances, hold that there is an entire non-compliance with the provisions of section 11, so as to invalidate the claims. I think that the defendants

Judgment. might have served any notices or papers upon the plaintiffs by registered letter directed to them at the city of Hamilton, in the county of Wentworth.

Street, J.

The plaintiffs were entitled to make Mrs. Malloch a party defendant in her character of prior mortgagee for the purpose of sub-sec. 3 of sec. 5 of R. S. O. ch. 126, for the enquiries under this sub-section are specially referred to the Master under sec. 13 of 53 Vict. ch. 37. If she be a subsequent, and not a prior mortgagee, she is, of course, a proper party as a subsequent encumbrancer. In either capacity, therefore, she is properly liable to be made a party. But she is not liable to be made a party in her capacity of prior mortgagee except for the purpose of having it declared that the selling value of the land has been increased by reason of the work or materials for which a lien is claimed. (a)

An examination of the provisions of 53 Vict. ch. 37 (1890), shews that the procedure there authorized was intended to be applied not to every case in which the right of a party to a mechanic's lien was involved, but to proceedings only in which the powers conferred upon the Master by the provisions of the Act should cover all the questions in controversy between the parties. There is no provision for the trial of any of the questions of rights which may readily arise in cases in which a claim to a lien is made, apart from the questions of the claim of the plaintiff to a lien, and from the questions of account which, as amplified by section 13, and referred to in section 5, seem to be the questions intended by the Act to be referred to the Master.

In the present case the plaintiffs have added Mrs. Malloch as a party for the sole purpose apparently of having a

(a) Sub-sec. 3 of sec. 5 of R. S. O. ch. 126, provides that "In case the land upon or in respect of which any work as aforesaid is executed or labour performed, or upon which materials or machinery are placed, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the construction, alteration or repairs of the building, or by the erection or placing of the materials or machinery, the lien under the Act shall be entitled to rank upon the increased value in priority to the mortgage or other charge."

declaration that her mortgage, which is *primâ facie* an encumbrance prior to the plaintiffs' liens, should be postponed to them by reason of notice of their liens at the time her advances were made, and of the absence of the declarations required by the Act of 1893.

Judgment.

Street, J.

I do not find in the Act of 1890, language shewing an intention to confer any power upon the Master to try such a question, any more than to try, for instance, a question as to whether a prior mortgage should not be declared to have been made fraudulently. Such questions, although they may be of great importance to the party having a lien, are outside of the "proceedings to enforce a lien" authorized by the Act in question, and can be put in issue on the same record with proceedings to enforce a lien only by an action. In other words, the Act allows a person claiming a mechanic's lien to begin his proceedings at the point where an order of reference would have been made under the former practice, with the addition that the Master has special statutory power to determine the right of the plaintiff to maintain the action, and power to determine against a prior mortgagee the question as to whether any part of his claim is to be postponed to the plaintiff's lien under sub-sec. 3 of sec. 5 of R. S. O. ch. 126. Any right, save those specially excepted, which a litigant theretofore possessed to have his rights determined at the hearing of the action and not in the Master's office are not taken away from him by the Act. The Master has no more right under its provisions to determine, as between a lienholder and a prior registered mortgagee, that the latter is to be postponed to the former upon the ground of fraud or notice, than he has to determine a question between the plaintiff and a paramount mortgagee under the reference in an ordinary mortgage action. The power in each case to settle priorities is to settle them as between subsequent not prior encumbrancers: see *McVean v. Tiffin*, 13 A. R. 1; *Re Sun Lithographing Co.*, 22 O. R. 57.

Judgment.

Street, J.

Mrs. Malloch is asking upon this motion to have her name struck out of the proceedings, on the ground, amongst other grounds, that the liens are not registered against her estate.

I think upon the statement of claim as it at present stands that she is not properly made a party for the reasons I have given, and that the motion to strike her name out succeeds.

The motion against the Master's finding in favour of the validity of the plaintiffs' liens fails. There will, therefore, be no costs of the present motion. The order will be that Mrs. Malloch's name be struck out of the proceedings unless within two weeks the plaintiffs amend their statement of claim by making proper allegations to bring her within sub-sec. 3 of sec. 5 of R. S. O. ch. 126, and file an affidavit verifying the truth of the proposed amendments. If the amendments are not made with the affidavit within that time then the order striking out her name will go.

G. F. H.

[CHANCERY DIVISION.]

STARK V. REID.

*Mortgage—Redemption—Right to Assignment—Right to Reconveyance—
R. S. O. ch. 102, sec. 2.*

The plaintiffs being mortgagees in possession of certain lands afterwards acquired by transfer a second mortgage on the same property, and sued the covenantors in the first mortgage, who had parted with the equity of redemption before the second mortgage was given, and who demanded a reconveyance upon payment of the amount of the first mortgage subject to equities of redemption existing in other parties:—
Held, that the defendants were entitled to this, and that the plaintiffs could not tack the amount of the second mortgage to the first and require payment of both.

Kinnaird v. Trollope, 39 Ch. D. 636, followed.

The defendants before action tendered, with the amount due on the first mortgage, an assignment thereof, which the plaintiffs being mortgagees in possession were not bound and declined to give, under R. S. O. ch. 102, sec. 2, and subsequently but without tender the defendant offered to take a reconveyance:—

Held, that the plaintiffs' claim to consolidate was not misconduct so as to deprive them of their costs of the action.

Decision of STREET, J., varied upon the question of costs.

THIS was an action for redemption or foreclosure brought Statement.
upon four mortgages by the personal representatives of T. M. Thompson, deceased, mortgagee, against George Reid the elder, John Bailey Reid, and the personal representatives of George Reid the younger, the mortgagors, and their respective wives under circumstances which are fully stated in the judgment of FERGUSON, J.

The action was tried at Toronto on September 17th, 1894, before STREET, J., together with another action by the same plaintiffs against the same defendants for redemption or foreclosure of nine other mortgages, the right to consolidate which with the four mortgages sued upon in this action was claimed by the plaintiffs in their reply herein.

The learned Judge held that the plaintiffs were not entitled to consolidate either the West mortgage in the judgments referred to, or the said nine other mortgages, with the four mortgages now being sued upon, but that the defendants were entitled to redeem the said four mortgages upon payment of the amount due thereon, less the

Statement. costs of this action from the time tender was made, up to which time the plaintiffs were entitled to their costs.

The plaintiffs moved before the Chancery Divisional Court by way of appeal from this judgment, and the motion was argued upon December 21st and 22nd, before BOYD, C., and FERGUSON, J.

Moss, Q. C., for the plaintiffs. We say that the defendants as mortgagors of the nine mortgages cannot alter their position as regards us without our consent. We say they must redeem the thirteen mortgages, and the West mortgage as well, if they want an assignment. As to the West mortgage, we have the right to insist that any assignment or reconveyance of the land should be subject to this. The defendants must put us in the position to which we are entitled under that mortgage: *R. S. O. ch. 102, sec. 2*; *Gooderham v. Traders' Bank*, 16 O. R. 438; *Muttlebury v. Taylor*, 22 O. R. 312. The English statute of 1881, on which our statute is founded, has been amended (*Imp. 45-46 Vict. ch. 39, sec. 12*), so as to give a more extended right to a mortgagor, by inserting the words, "notwithstanding any intermediate incumbrance." See, also, *Rogers v. Wilson*, 12 P. R. 322; *Teevan v. Smith*, 20 Ch. D. 724; *Alderson v. Elgey*, 26 Ch. D. 567. The mortgagors here have so mixed themselves up with this transaction, that they must be held to have authorized what was done, and so are not within the rule of *Kinnaird v. Trollope*, 39 Ch. D. 636. If the defendants are to make us assign the mortgages, we should have a right to consolidate the whole thirteen. The right of consolidation always exists against the original mortgagors: *Griffith v. Pound*, 45 Ch. D. 553, especially at pp. 560 and 561; *Harter v. Colman*, 19 Ch. D. 630, especially at p. 639; *Baker v. Gray*, 1 Ch. D. 491; *Pledge v. Carr*, [1894] 2 Ch. 328. There was also no ground for depriving us of our costs: *Rule 1170*. See *Cotterell v. Stratton*, L. R. 8 Ch. 295, 302; *Little v. Brunker*, 28 Gr. 191; *Kinnaird*

v. *Trollope*, 42 Ch. D. 610. We should not have been ordered to pay costs. Argument.

F. Hodgins, for the defendants. The plaintiffs have foreclosed the equity of redemption in the West mortgage. At the date of the trial there was no West mortgage outstanding at all. We have always insisted on the form of reconveyance as settled in *Kinnaird v. Trollope*.

The plaintiffs have treated us throughout as if we were owners of the equity of redemption. But we parted with it in 1888, and have had nothing to do with the property since then. See, also, *Jennings v. Jordan*, 6 App. Cas., 698. The mortgagee is bound to hand us back the property, unaffected by anything he has done. We cannot be sued on our covenant after parting with the equity of redemption, without this reciprocal right against the mortgagee. Moreover, as to consolidation, the West mortgage was a registered mortgage in 1888: *Johnston v. Reid*, 29 Gr., 293; *Miller v. Brown*, 3 O. R. 210. Besides, by the issue of this writ confined to the four mortgages, they elected not to consolidate: *Scarf v. Jardine*, 7 App. Cas., 345. As to costs I refer to *Miller v. Brown*, 3 O. R. 210; *Smith v. Smith*, 18 O. R. 205; *Queen's College v. Claxton*, 25 O. R. 282. Where consolidation has been wrongly claimed, the mortgagee should be made to pay the costs.

Coatsworth, on same side. Where it has been held that the mortgagee is not bound to assign, it has been because the mortgagor was either directly, or in some way personally liable to pay the second incumbrance: *Queen's College v. Claxton*, 25 O. R. 282; *Muttlebury v. Taylor*, 22 O. R. 312; *Teevan v. Smith*, 20 Ch. D. 724; *Rogers v. Wilson*, 11 P. R. 322; *Alderson v. Elgey*, 26 Ch. D. 567.

Moss in reply. As to the final order of foreclosure, it has been held that even where the mortgagee has taken a release of the equity of redemption from the mortgagor, he may sue and open up the foreclosure: *North of Scotland Mortgage Company v. German*, 31 C. P. 349. Then a final order taken *pendente lite* may be treated in the same way. We can abandon the final order, and if it

Argument. is to make any difference, we hereby abandon it. The execution issued on the judgment itself opened up the foreclosure. The defendants are not entitled to the benefit of the statute they rely on, except upon such terms as the Court may consider right to propose for the protection of the plaintiffs in making the assignment. There is a statutory right, if any, and it is limited by certain provisions. The statute generally is restrictive. It does not apply to every case, and amongst others it does not apply to the position of a mortgagee in possession. They are practically coming now for redemption of the land, and we are entitled to all the remedies of a mortgagee, who has other securities in his hands. As to costs, I refer to *In re Watts, Smith v. Watts*, 22 Ch. D. 5, especially at pp. 12-3.

January 10th, 1895. FERGUSON, J. :—

On the 7th day of December, 1887, the defendants George Reid the elder, and John B. Reid and George Reid the younger, were tenants in common in fee of four parcels of land situate on Pape avenue in the city of Toronto, and made and executed a mortgage on each one of the four parcels in favour of the late T. M. Thompson, each of such mortgages securing the sum of \$1,000 and interest. The plaintiffs are the executors and executrices of the late Mr. Thompson, the mortgagee. One of the mortgagors has since died also and his personal representatives are defendants here with the surviving mortgagors. It may be convenient sometimes to speak of the plaintiffs and defendants as mortgagees and mortgagors respectively, although this will not be quite accurate.

On the 7th day of June, 1888, the mortgagors sold and conveyed the equity of redemption in these four parcels, that is to say, sold the four parcels of land subject to the four mortgages to one Louisa West for the expressed consideration of \$6,800, and in this conveyance it is expressly stated that the sum of the four mortgages—\$4,000—formed part of the consideration.

On the 20th day of June, 1888, Louisa West executed a mortgage to her vendors (the mortgagors in the four mortgages to Thompson) of this same equity of redemption to secure \$1,100 of the purchase money to be paid by her. Judgment.
Ferguson, J.

Afterwards, Louisa West required an extension of time for the payment of this \$1,100 which her mortgagees declined to grant, and she then borrowed from the plaintiffs as the personal representatives of Thompson for the purpose of paying the mortgage money to the defendants, the sum of \$1,100, and as a security for the same procured for the plaintiffs an assignment to them from the defendants of the \$1,100 mortgage. There was some contention as to whether or not the essence of this transaction was a loan by these plaintiffs to Louisa West, and I agree with the learned Judge before whom the action was tried in thinking that it was, and that the defendants had no concern in it but to receive their money and assign the mortgage to the new lenders the plaintiffs.

The plaintiffs then held a mortgage upon each of the four parcels of land securing \$1,000 (\$4,000 in all), executed by the defendants, and the mortgage from Louisa West upon the equity of redemption in all four parcels, securing \$1,100, and they instituted proceedings for the foreclosure of the mortgage from Louisa West for the \$1,100. In these proceedings for foreclosure writs of *fiery facias* against Louisa West were issued on the 22nd day of February, last, and duly placed in the hands of the proper sheriff to be executed; and on the 22nd day of August last, a final order of foreclosure was issued. This final order is not before us. It was at the trial, but counsel said that it was put in as evidence in another action which seems to have been (in a way) tried at the same time as this one.

On the argument before us, plaintiffs' counsel stated that the plaintiffs could and that they would open up this foreclosure. I apprehend that they have the power so to do, and, if they do, they will be, as before, mortgagees of the equity of redemption (in the four parcels) which arose

Judgment. upon the execution of the four mortgages firstly mentioned.
Ferguson, J. If, however, they do not do so, they will be and remain, as I understand the matter, the owners of such equity of redemption, and in either case assignees of it.

This action was commenced on the 24th day of March last, and the final order of foreclosure above mentioned was obtained pending these proceedings. The plaintiffs had been and were at the commencement of this action in possession of each of the four parcels of land mortgaged by being in the receipt of the rents and profits of the same, making repairs thereon, etc., etc.

At the trial there seems to have been, as there was in the early part of the argument before us, a contention as to the right to consolidate nine other mortgages mentioned and referred to in the plaintiffs' reply with the four firstly mentioned mortgages, but, as I understood counsel, it was finally conceded that, in the circumstances now existing, this could not or should not be insisted on.*

It seems by a perusal of the reporter's notes that at the trial the pleadings were not strictly adhered to, and that counsel and the learned Judge proceeded on the facts in evidence rather than the pleadings as framed, and on the argument before us it was stated and conceded that the action might fairly and properly be treated as an action against the defendants upon the covenants contained in the four mortgages for the recovery of the mortgage moneys or the part thereof remaining unsatisfied, and that for all purposes here the action should be so treated.

* The judgment of the learned trial Judge, in the matter of the right of consolidation as to the thirteen mortgages, was delivered at the close of the argument as follows: The whole thirteen mortgages, it is true, were made by the Reids; but I think the circumstances here clearly shew that there is no right to consolidate them as against any person. If they are consolidated for any purpose, they are consolidated for all purposes; and I think it is manifest, that it would be inequitable, that they should be consolidated for all purposes. As I understand the law of consolidation, it does not arise immediately upon two different mortgages upon two different properties being made by the same person. It is only when these mortgages are overdue, and when the mortgagor seeks to redeem one of them without the other, and when

The plaintiffs in their statement of claim give the defendants certain credits as the respective amounts of rents and profits received by them, making also certain charges for the costs of repairs upon the premises, taxes paid, expenses, etc., exhibiting in brief a sort of mortgage account, claiming a large balance as still owing upon the four mortgages.

Judgment.

Ferguson, J.

The defendants did not dispute this account or the result of it, and pending these proceedings, and on the 24th day of April last offered the plaintiffs a marked cheque for the amount of the balance claimed, at the same time requiring from the plaintiffs the execution of an assignment or assignments of the four mortgages to them. The plaintiffs did not object, and they do not now object to this as a tender on account of its being a cheque and not money, and they admit that the cheque was for a sum sufficient, but they say that they were not bound to assign the mortgages, and that their assigning them to the defendants' nominee was made a condition of the offer or tender. The offer was refused, and no money was then or subsequently paid into Court. Afterwards, and about the 11th day of June, 1894, the defendants offered to take from the plaintiffs a reconveyance of the mortgaged premises, subject to equities of redemption existing in persons other than the defendants, in their letter enclosing this, referring to the case *Kinnaird v. Trollope*, as to the form of such conveyance, but at this time there was no offer or any tender of the mortgage money.

the mortgagee seeks to foreclose both as against the whole property, that the consolidation takes place. In other words, the mortgagee has a right to elect, and upon his electing to do it, under proper circumstances, then the mortgages are taken to be consolidated. But the proper circumstances must exist before the mortgagee can elect to consolidate. He cannot elect to consolidate so as to do injury to any person, and burden the equity of redemption of any person who is not subject to have his equity of redemption burdened. Now, here, before there was any right to consolidate, that is to say, while both mortgages were current, as I understand it, the mortgagors conveyed the properties covered by the four mortgages to Mrs. West. Mrs. West, so far as appears, had no notice, whatever, of the existence of the other mortgages. From that

Judgment. As to the contention that the plaintiffs are entitled to consolidate, or in any way unite the mortgage upon the equity of redemption with the four mortgages on the covenants contained in which they have sued, I am of the opinion that it cannot prevail. So far as I am able to understand no one of the cases relied on in support of this contention shews, or goes to shew, that the plaintiffs have this right. I have found no authority that does, and I am of the opinion that the plaintiffs cannot properly say to the defendants that the defendants must pay the \$1,100 mortgage in order to entitle them to pay off the other four mortgages, and get their reconveyance or other proper acquittal according to their rights.

Section 2 of ch. 102, R. S. O., provides on its face that the section shall not apply in the case of the mortgagee being or having been in possession. The plaintiffs having been and being in possession, the defendants are not under the provisions of that section entitled to an assignment of the mortgage debt and a conveyance of the mortgaged property to a third person, etc. The case, then, as it appears to me, is: These defendants, mortgagors, sold and conveyed away their equity of redemption arising upon their execution of the four mortgages, and they are now sued for the amount of the mortgage moneys that remains unsatisfied after being credited with the rents and profits received in excess of proper outlays.

In the last edition (5th ed.) of Seton on Decrees, at p. 1598, it is said "that a mortgagor who has absolutely

time it was impossible that the thirteen mortgages could be consolidated, because Mrs. West had taken the equity of redemption without notice of the nine, and so there was no right to burden her equity of redemption by the addition of these nine mortgages. While that state of things existed, while there was unquestionably no right of consolidation, the original mortgagors, who still held as a partnership property, the property covered by the nine mortgages,—these original mortgagors dissolved partnership and wound up their affairs, and allotted to one of the mortgagors, in severalty, the property covered by the nine mortgages, and he accepted it as his share of the partnership property. It would be inequitable, under the circumstances, he having taken the equity of redemption in severalty at a time when there was no right to consolidate,

assigned his equity of redemption, when sued on the Judgment. covenant in the mortgage, acquires a new right to redeem, Ferguson, J. and, on paying off the debt, is entitled to have a reconveyance to himself, subject to such equity of redemption as may be vested in other persons." The reference is to *Kinnaird v. Trollope*, 39 Ch. D. 636.

The case *Pearce v. Morris*, L. R. 5 Ch. 227, decides that on tender by a person having a partial interest giving a right to redeem, the mortgagee is bound to convey, but the conveyance should reserve the equities of other persons interested. At page 231, Lord Hatherley said: "As regards the form of the conveyance, I apprehend it should be drawn in such a manner that there should be very little difficulty arising upon the subject afterwards, and that there should be expressed on the face of the conveyance a statement of some kind with reference to the exact position of the parties."

In the case *Teevan v. Smith*, 20 Ch. D., at p. 729, Sir George Jessel, M. R., after discussing somewhat the words: "Where a mortgagor is entitled to redeem," employed in the statute, says that they really include every mortgagor except a mortgagor who is precluded by some special term of the mortgage deed from redeeming within a specific time. The case *Kinnaird v. Trollope*, see at p. 645, fully sustains the statement I have quoted from Seton on Decrees, the learned Judge adding: "In other words, the assignment of the equity of redemption, did not render

it would be inequitable to allow consolidation, because of something happening afterwards which, it is said, gives the mortgagees a right to consolidate again, revives their right,—that is to say, the fact that they foreclosed the equity of redemption of Mrs. West in the properties covered by the four mortgages. I do not think that the circumstance can have any such effect in any event; but certainly the fact that it has happened, and happened pending these actions, does not operate to entitle the mortgagees to burden the estate of the representatives of George Reid, the younger, with the four mortgages in addition to the nine that they took subject to, or to burden the property covered by the four mortgages with the nine mortgages. So I think, upon the question of consolidation, that the contention of the mortgagees has been wrong throughout.

Judgment. absolute a covenant on the part of the mortgagor, which
Ferguson, J. had previously been (in equity) conditional only," and as to the form of the reconveyance reference is made to what is indicated in *Pearce v. Morris*.

The learned Judge further says: "Then, does it make any difference if, after the assignment of the equity of redemption, the assignee mortgages either to the original, mortgagee or to some other person? I think not." And further: "Such a mortgage creates in the new mortgagee a fresh interest in the equity of redemption, but it does not, in my opinion, impose any additional burden or liability on the mortgagor." It is also said that the mortgagor on paying off the mortgage debt is entitled to have the property returned to him unaffected by any acts of the mortgagee not authorized by the mortgagor.

The cases in our own Courts on the subject are, so far as I have seen, cases in which the mortgagee had not been in possession, and fell under the provisions of the statute providing for an assignment, etc., to a nominee of the mortgagor. As before stated, the plaintiffs have not, as I think, the right to consolidate the \$1,100 mortgage on the equity of redemption with the other four mortgages, or in any manner so to unite it with these mortgages that the defendants would be obliged to pay the whole, if any, and the defendants upon their paying the amount unsatisfied upon the four mortgages for \$1,000 each are entitled to have from the plaintiffs a reconveyance of the mortgaged property to them subject to such equity of redemption as may be subsisting in any person or persons other than the defendants themselves, and to have all the deeds delivered to them.

It may be that in taking the accounts the plaintiffs will be able to shew that they have the right still to apply the rents and profits received by them in reduction of the amount of the \$1,100 mortgage. I do not desire to say anything towards precluding them from making the effort to do this.

As to the costs. In the case *Cotterell v. Stratton*, L. R.

8 Ch. at p. 302, Lord Selborne uses language that one finds in many of the cases and books. The learned Judge says: "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court, which, in litigious cases, is generally not subject to review. The contract between the mortgagor and the mortgagee, as it is understood in this Court, makes the mortgage a security, not only for the principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption." Judgment.
Ferguson, J.

I have perused the very full discussion of the subject of mortgagees' costs by the learned Judge in the case *Kinnaird v. Trollope*, 42 Ch. D. 610, in which the learned Judge also discusses and refers to authorities upon the subject of tender at common law, and also in equity. I have become satisfied, that the so-called tender in the present case was not a good one, for the reasons that at the time the cheque was offered the offer was accompanied with an unwarrantable condition; that there was not evidence of the money having been kept ready, and that the money was not paid into Court. The action was, in the first place, one on the covenants in the mortgages, and was like a common law action. The claim made was as a money demand irresistible, and so far, it cannot be even hinted, I think that the plaintiffs were not entitled to their costs therein.

When this action was brought, the right of the defendants to redeem arose, and they availed themselves of it. Thereafter the suit may be said to be a redemption action. In this redemption suit I am unable to point out any misconduct on the part of the plaintiffs that could at all have the effect of depriving them of their costs upon the cases that I have perused, unless it can fairly be said that the effort made by the plaintiffs to unite the \$1,100

Judgment. mortgage to the other four mortgages was misconduct or
Ferguson, J. amounted to a denial of the right to redeem.

It seems to be settled that a mortgagee claiming more than he is entitled to is not sufficient to deprive him of his costs: *Hodges v. The Croydon Canal Co.*, 3 Beav. 86; *In re Watts, Smith v. Watts*, 22 Ch. D. 5.

It seems, from the language of Lord Cairns in *Credland v. Potter*, L. R. 10 Ch. 8, that the right to tack may be so claimed by a mortgagee as to bring him within the rule applicable to cases where the right to redeem is denied.

Looking at the transactions from the beginning, I do not think that the plaintiffs' making this claim was misconduct. I do not see that it falls within the meaning of that expression as it is employed in the cases and books. Nor do I see that the making of the claim can be considered as amounting to a denial of the right to redeem, a right which was, in fact, never denied. The making of the claim was not, as I think, either fraudulent or frivolous, although my opinion is against the plaintiffs on the merits of it.

I think the plaintiffs are entitled to the costs of the action, to be added to their claim. But I think there should be no costs of the present appeal. Inasmuch, however, as the plaintiffs are still to be at liberty to make the effort to credit the rents and profits upon the mortgage on the equity of redemption, instead of upon these four mortgages, further directions and subsequent costs should be reserved.

BOYD, C. :—

When the mortgagor who pays under his covenant has assigned the equity of redemption, the form of reconveyance should be of the legal estate to the mortgagor who pays, subject to the equity of redemption of his assignee, and the mortgage should itself be handed over for securing him in the amount paid upon the mortgage. As to the merits I am, after careful consideration, unable to distinguish this case from *Kinnaird v. Trollope*, 39 Ch. D. 636. The mortgage given by the defendants was of the legal

estate, and secured the amount thereon advanced; then their interest in the property ceased, and Mrs. West became owner, subject to this first mortgage. She mortgaged on the security of the equity of redemption to the defendants who afterwards assigned this mortgage to the plaintiffs. It matters not to my mind whether the actors in this were the defendants selling this second mortgage, or the assignee of the estate Mrs. West negotiating a new loan from the plaintiffs; in neither aspect were the defendants personally liable to pay that second mortgage, and they cannot be called upon to pay it upon redemption unless it can be tacked to the first mortgage. But no such case of tacking is to be found in England, and it would be besides, even if permissible there, directly in the teeth of our statute which forbids tacking.

Judgment.
Boyd, C.

As a matter of practice it would seem that the plaintiffs were not called on to give, out of Court, an assignment of the mortgage to the defendants' nominee because it appears that the mortgagees were in possession of the property, and the enactment as to assignment of mortgage upon redemption does not extend to the case of a mortgagee in possession: R. S. O. ch. 102, sec. 2. The tender, therefore, was not of such a character being accompanied by the draft assignment of mortgage as to put the mortgagees so plainly in the wrong that they should be made to pay costs.

I have hesitated as to the disposition of costs of action, not in so far as exempting the plaintiff from paying costs, but whether both parties should be left to pay their own costs in consequence of the alleged tender and the claim for more, or whether costs should still go to the mortgagees. My brother Ferguson takes a decided view in favour of the mortgagees. I am not prepared to dissent from that disposition of the costs up to the hearing. No costs of appeal.

If either party seeks a reference to take accounts it may be ordered. Further directions and subsequent costs reserved.

[CHANCERY DIVISION.]

STRIDE V. THE DIAMOND GLASS COMPANY.

*Master and Servant—Negligence—Defect in “Way”—Public Street—
55 Vict. ch. 30, secs. 3, 6.*

A public street in a defective condition, used by an employer in connection with his business is not a “way used in the business of the employer” within the meaning of 55 Vict. ch. 30, sec. 3 (O.).

The defendants’ factory was built immediately on the line of a public street which was fourteen feet wide at the place, and on the other side there was a steep declivity, without a fence. One of their workmen was on a load of straw on a waggon unloading it into the defendants’ premises through an aperture facing the street, when he lost his balance, fell off, and down the declivity, and was killed :—

Held, that the defendants were not liable.

Statement.

THIS was an action brought by the administratrix of Frederick Augustus Stride for damages for the death of the latter when employed as a labourer in the service of the defendants, manufacturers of glassware, carrying on business in the city of Hamilton.

The manner in which the deceased met with the accident complained of, and the other circumstances of the case are set out in the judgment of FERGUSON, J.

It may be added, however, that the plaintiff alleged in her statement of claim that owing to the negligence of the defendants, the condition and arrangement of the defendants’ packing house, and the road or way running along the east side thereof where the accident happened, were at the time defective in having the only entrance to the said packing house for the receipt of straw, for use in the said packing house, so arranged that the only approach to such entrance was by the road or way on the east side which was dangerous, in that the said road or way was too narrow, and sloped outwards and was not fenced in or guarded, thus rendering the same extremely dangerous.

In their statement of defence the defendants alleged that the road or way in question was part of McNab street, in the city of Hamilton, and was not the property of, or belonging to, or in the possession or control of the defendants as alleged.

The plaintiff by her reply stated that the road or way Statement.
in question was used or employed by the defendants as a road or way in connection with the works and manufactory of the defendants, and the premises connected therewith and of the business carried on by them therein, and was so used and employed for the benefit, profit, and advantage of the defendants, and was the means of access to and from the manufactory of the defendants for the purpose of the business carried on by the latter in their said manufactory.

The action was tried at Hamilton at the last Autumn Assizes before FALCONBRIDGE, J. The jury were unable to agree upon a verdict, but the trial Judge nevertheless dismissed the action without costs.

The plaintiff now moved before the Divisional Court to set aside the judgment of nonsuit or for a new trial, on the ground that the judgment was contrary to the law and evidence, and the weight of evidence, and also on the ground that the jury having failed to agree on the questions submitted to them by the trial Judge the action should have been allowed to stand over for trial at the next sittings of the Court, and should not have been dismissed.

The motion was argued upon December 20th, 1894, before BOYD, C., and FERGUSON, J.

Carscallen, Q. C., for the motion. The action is brought under sections 1, 2 and 3, of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. ch. 30 (O.). The defendants having constituted the street a "way" in connection with their premises, must be held responsible: Holmested on The Workmen's Compensation for Injuries Act, 1892, pp. 25-47. The arrangements here were defective, needlessly exposing to danger. The defendants cannot excuse themselves by saying it is a public street: *Weblin v. Ballard*, 17 Q. B. D. 122.

[BOYD, C.—The workman knew the danger as well as the employer.]

Argument. That does not exonerate him from liability: *McGuire v. Cairns & Co.*, 17 Ret. 540. There was a defect in the way here: Holmsted, *ibid.*, p. 31. The employer needlessly exposed his workmen to danger by adapting his premises in the way he did.

E. Martin, Q. C., for the defendants. The case is one of pure accident; there is no negligence whatever. It is an abuse of terms to call this place dangerous. No case can be found where "way" is interpreted as anything but a private way. This was not a way of the factory, any more than any other public street by which the defendants might send their goods to the railway. They had nothing to do with the cutting of the street, or the embankment. Rules 755 and 799 shews the powers of the Court here. And as to what the trial Judge did, see *Whitewood v. Anderson*, 11 Times L. R. 48. In its general features the case is very like *Poll v. Hewitt*, 23 O. R. 619. See also *Thomson v. Dick*, 19 Ret. 804; *Heudford v. The McClary Manufacturing Co.*, 23 O. R. 335. The defendants would have been trespassers if they had put up a rail on this street.

Carscallen, in reply. We place the case on the ground the defendants used a dangerous place. See as probably the nearest case to this, *Gill v. Thornycroft*, 10 Times L. R. 316; also *Caldwell v. Mills*, 24 O. R. 462, especially judgment of ROSE, J., at p. 466.

January 10th, 1895. FERGUSON, J.:—

The defendants are sued as employers within the meaning of the Workmen's Compensation Act, 1892. At the trial the jury failed to agree, yet the learned Judge entered a nonsuit. This motion is to set aside the nonsuit and for a new trial. Although other matters are mentioned in the statement of claim, that upon which the action is really based is an alleged defective way or approach used by the defendants in their business by reason of which the accident to the workman happened and the

injury arose, and this was the matter that was the subject of argument before us. Judgment
Ferguson, J.

This way was and is a part of a public street in Hamilton—McNab street—along the margin of which is the defendants' factory, or that part of it material here. The way, as admitted, is fourteen feet wide, and a good way for that width all along the defendants' place. The work being done by the workman to whom the accident happened was unloading bales of straw off a one-horse waggon seven feet wide, which was on this way, into the defendants' premises through an aperture therein at some height above the load of straw. The road was close to the building, but at the distance of fourteen feet therefrom there was a declivity of the depth of several feet which it was contended was the cause of the accident. (a) It was urged that this should have been protected by the defendants by a fence or otherwise, and that if this had been done the accident would not have happened.

By section 3 of the Act provision is made for cases of personal injury to a workman by reason of any defect in the condition of the ways, works, machinery, plant, etc.: sub-sec. 1.

Section 6 provides that a workman shall not be entitled under the Act to any right of compensation or remedy against the employer under sub-sec. 1 of sec. 3 unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person entrusted by him with the duty of seeing that the condition of the ways, etc., was proper: sub-sec. 1.

The way in question was a public highway, and the duty of keeping it in repair rested upon, if on any one, the municipal corporation. The defendants had no right or authority to construct a fence or guard, or to make any alterations or changes upon it. The defendants used this way so far as appears just as all persons were entitled to

(a) The deceased lost his balance, fell off the load of straw, and down the declivity, and was killed.—REP.

Judgment. use it. It was a public highway, nothing more or less,
Ferguson, J. and it does not seem to me to differ the matter that the
defendants used it much more than any one else. It ap-
pears that the general public used it very little, but there
does not appear to have been anything done by the defen-
dants to even wrongfully appropriate the way. To me it
seems upon the evidence that the way was good and of
sufficient width, but assuming that there was a defect
in it, can it be said that this arose, or had not been dis-
covered or remedied owing to the negligence mentioned in
sec. 6, sub-sec. 1 of the Act, where neither defendants
or any person entrusted by them as stated in that sub-section
had any right, power or authority, to make any changes
in the condition of the way? I think it cannot.

In the case *Engel v. New York, Providence and Boston R.W. Co.*, 160 Mass., p. 260, the words of the Act as quoted in the judgment are substantially the same as the words of our sec. 6, sub-sec. 1, and the Court said: "These words mean that the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right."

The contention that the defendants should not have adopted and used this way is, I think, also answered by that case.

On the whole case I do not see that there was evidence proper to be submitted to the jury.

I do not think we should trouble as to whether or not the learned Judge formally reserved judgment on the motion before him for a nonsuit. We cannot at present, see him, and I think we should presume that he, at all events, understood that he did so and disposed of this motion on the merits.

I think the judgment (nonsuit) should be affirmed with costs.

BOYD, C.:—

The question mainly argued in this case of injury arising from the alleged defective condition of a public street

which was used by the employer in connection with his business, was whether this was a "way used in the business" within the meaning of the Employers' Liability Act, sec. 3, sub-sec. 1. Light is thrown upon the scope of these words by sec. 6, sub-sec. 1, which provides that the workman shall not be able to recover unless the defect arose from or had not been remedied owing to the negligence of the employer. That means some defect on his premises, or on a place over which he had control that could be made right by the employer. Such is not the case in regard to a public street upon which the employer had no right to construct a fence or barrier as is here suggested. One part of the street is higher than the other, but it is the business of the corporation of the city to deal with the alleged defect in the interests of the public, or be exposed to action by injured persons. It is to be borne in mind that the true view of the legislation is as expressed by Bowen, L. J., that it has placed the workman in a position as advantageous as, but no better than that of the rest of the world who use the master's premises at his invitation on business: *Thomas v. Quartermaine*, 18 Q. B. D., at p. 693.

This case in regard to a public street is stronger than one which arose last year in Massachusetts in regard to the track of one railroad company which another company was in the habit of using. It was there laid down that neither the language of the statute nor good sense would permit the Court to hold an employer liable for defects which he cannot help, in a place out of his "control, to which his employers once in a while may be called for a few minutes": *Holmes, J., in Engel v. New York, Providence and Boston R. W. Co.*, 160 Mass. 260.

Other points of grave difficulty would present themselves in the way of the plaintiff's recovery if this were removed, but this goes to the root of the litigation and ends it. Judgment should be affirmed.

Judgment.

Boyd, C.

[CHANCERY DIVISION.]

MOLSONS BANK v. HEILIG.

Principal and Surety—Security held by Creditor—Release of same without Consent of Surety—Rights of Surety—Judgment.

The plaintiffs, who held a number of promissory notes of a customer, endorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as endorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant :—*Held*, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their dealings with the mortgaged property when that security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained. Decision of ROBERTSON, J., 25 O. R. 503, modified.

Statement. THIS was a motion by the plaintiffs by way of appeal from the judgment of ROBERTSON, J., reported, 25 O. R. 503, where the facts are stated as admitted by the plaintiffs.

The motion was argued on December 19th, 1894, before BOYD, C., and FERGUSON, J.

Crerar, Q.C., and P. D. Crerar, for the plaintiffs. The defendant contends that because we released a portion of the mortgaged lands without his consent, he is released from the note, and he never asked for an account.

[BOYD, C.—But should he not be allowed an account on proper terms ?]

The judgment is impracticable. The Master would have to take a speculative estimate of the value of a number of properties. The account of Paterson Bros. might go on indefinitely.

[FERGUSON, J.—Any indorser who paid would be entitled to contribution from any security there was.]

The time for that has not come. If the judgment is good law no bank dare take collateral security. I refer to *Duncan, Fox & Co. v. North and South Wales Bank*, 6

App. Cas. 1, at p. 12. The bank must first be paid its own Argument.
claim before any cognizance can be taken of the relation
of principal and surety. The bank could have released
all the securities and no one could have complained. The
security was wholly a contract between the customer and
the bank, for the benefit of the latter. The indorsers are
not, during the currency of the note, in the position of
sureties. If this judgment stands, it means we must close
up Paterson Bros.' account, and realize on these securities.

Nesbitt, Q. C., for the defendant. We were entitled to
the benefit of all securities, whether taken before or after
the note: *De Colyar's Law of Guarantees*, 2nd ed., p. 290;
Forbes v. Jackson, 19 Ch. D. at p. 622.

[BOYD, C.—Yes, if you are a surety. The question is,
are you a surety?]

Heilig was a surety, and as such, was entitled to the
benefit of the securities: *Polak v. Everett*, 1 Q. B. D. 669,
at p. 674; *Pearl v. Deacon*, 24 Beav. 186. We had a right
to the particular security. It is not a question of accounting,
Duncan, Fox & Co.'s Case is distinguishable, and the plain-
tiffs resting their case where they did, the defendants are
now discharged. As to our being sureties, see *De Colyar*,
ad loc. cit., and *Duncan, Fox & Co.'s Case*.

P. D. Crerar, in reply. All that was pleaded was a dis-
charge. There was no contention of a release *pro tanto*
to extent of damage; hence, the evidence was not given.
All cases cited by ROBERTSON, J., and by counsel for defen-
dant, except *Duncan, Fox & Co.'s Case*, are cases of sureties.
Indorsers during the currency of the note are not in such a
position. An indorsement is an absolute promise to pay.
An indorser is not a surety in the ordinary sense: *Wilkin-
son & Co. v. Unwin*, 7 Q. B. D. 636. The pleadings did not
allege that we had been negligent with our securities, and
negligence will not be assumed.

January 10th, 1895. BOYD, C.:—

The only issue raised is whether the defendant is released
from all liability because of the bank having released part

Judgment.
Boyd, C.

of the property held in security for this and other promissory notes given by Paterson & Co. as collateral security to the bank. The only right the defendant has is to have it ascertained in how far he is entitled to the benefit of any part of the property so released. It does not matter whether the security was discharged without consideration or for consideration, the surety can only ask for an account when the proper time comes. The rule is clear that when the creditor wastes or deals improperly with a security the surety is discharged, but only *pro tanto*: *Ward v. National Bank of New Zealand*, 8 App. Cas., at p. 766, and *Taylor v. The Bank of New South Wales*, 11 *ib.*, at p. 602.

The judgment should therefore be modified and entered for the amount of the note and interest, to be recovered from the defendant without prejudice to his right to make the bank account for their dealings with the mortgage property held for the benefit of all the indorsers on the \$40,000 of the Paterson paper, when that security has answered its purpose, or the debt has been paid by the sureties; or when, in any other event, the application of the moneys from the securities can be properly ascertained: see, *per* Selborne, L.C., in *Duncan, Fox & Co. v. North and South Wales Bank*, 6 App. Cas., at pp. 15, 16.

The plaintiffs should get costs of trial and appeal and cross-appeal, to be added to the security.

FERGUSON, J.:—

The cases *Ward v. The National Bank of New Zealand*, 8 App. Cas. 755, at pp. 765, 766, and *Taylor v. The Bank of New South Wales*, 11 App. Cas. 596, shew, I think, clearly that the defence set up in the 8th and 9th paragraphs of the statement of defence, (a) and very stoutly contended for, cannot be sustained on the evidence here, and that what and all that the defendant could be entitled to in respect of the securities referred to in those claims is an account, and ultimately a discharge *pro tanto*.

(a) See 25 O. R. at p. 504.

On the present record, and on the whole case, I think ^{Judgment.} the proper judgment is a judgment for the plaintiffs for ^{Ferguson, J.} the amount of the promissory note sued on, the same to be without prejudice to any right the defendant may have, or be able to establish hereafter, in respect to the securities mentioned in the statement of defence. I agree with what is said by the Chancellor in regard to these securities.

I think the plaintiffs should have their costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

COLE V. HUBBLE.

Seduction—Action for Connection by Force—Previous Acquittal for Rape—Amendment—Surprise.

In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connection with her by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor was any suggestion made that they were in any way prejudiced by the amendment:—

Held, that the amendment was properly allowed:—

Held, also, that the fact of the defendants having been previously acquitted on an indictment for rape on the plaintiff's daughter was not a bar to the action.

THIS was an action brought to recover damages for en- ^{Statement.} ticing away the plaintiff's daughter and seducing and carnally knowing her.

The action was tried before MEREDITH, J., and a jury, at Belleville, at the Autumn Assizes of 1894.

The evidence disclosed that the connection with the plaintiff's daughter constituted in law a rape.

The defendants pleaded and proved by the production of the record that they had been criminally tried

Statement. for rape and had been acquitted : and it was contended that the record of acquittal constituted an estoppel against the right of the plaintiff to recover.

At the conclusion of the case, and after counsel had addressed the jury, the plaintiff was allowed to amend by setting up as an alternative cause of action, the enticing away of the daughter, followed by the connection with her by force and against her will, and the consequent loss of service.

Questions were submitted to the jury, which, with their answers, were as follows :—

1. Did the defendants entice the plaintiff's daughter as alleged in his claim ? A. Yes.

2. If so, what damages, if any, has the plaintiff sustained in the loss of the daughter's services by reason thereof ? No answer to that question ; we could not answer it.

3. Did the defendant ravish the plaintiff's daughter against her consent, as she has testified ? A. Yes.

4. If so, what damages, if any, has the plaintiff sustained in the loss of the daughter's services by reason thereof, deducting damages, if any, for enticing her away ? A. \$250.

5. Add additional damages, if any, sustained by the plaintiff by being deprived of the society and comfort of his child, and by the dishonour which he has suffered ? A. \$1,000.

The learned Judge reserved his decision on the legal objection taken and subsequently, on 19th September, 1894, delivered the following judgment :—

MEREDITH, J. :—

The plaintiff is entitled to judgment, but for the \$250 only.

There is nothing in the point made by the defendants in their pleading, and so much urged in their behalf during the trial, that the plaintiff is estopped by the result of the criminal proceedings. I so ruled during the progress of

the trial. If the defendants are dissatisfied with that Judgment.
ruling their course is to move against it elsewhere. Meredith, J.

Nor does anything turn upon the question whether an action lies in a case of seduction not followed by pregnancy. No case of seduction was made by the plaintiff at the trial, and no witnesses were called for the defence, so that the plaintiff must stand or fall upon a claim for damages by reason of the rape now proved and found to have been committed upon his daughter. The jury have given no damages—they were unable to agree upon that question—in respect of the enticing away of her found by them.

The defendants at the criminal trial chose to contend and shew that the case was one of seduction only, and in that way succeeded there. They choose now to let it appear in evidence, uncontradicted by them, that the case was one of rape and not of seduction; and, if the young woman were to sue for damages, they would doubtless again contend and endeavour to shew that it was seduction only. Whatever the real truth of the matter may be, they must take the consequences of the findings of the jury, which, doubtless, their exigencies, and what they conceived to be the requirements of their own interests, have helped to bring about.

I may, however, say that, in this case, had seduction been proved and found, I am far from thinking that the action would not lie merely because the seduction was not followed by pregnancy: according to the evidence it was followed by sickness causing actual loss to the plaintiff. Pregnancy and birth of a child are generally alleged, but as shewing damages, not as the cause of action. Pregnancy and birth of a child alone give no cause of action. The wrong done is the act of seduction; but it must be followed by actual loss by reason thereof. Seduction alone gives no right of action; but where there is loss to the master, as a direct consequence of the wrong done, what difference can it make whether that be from the sickness of pregnancy and child-birth, or from mere sickness alone?

Judgment. Can it be that, if such a consequence be disease and complete disability to serve, no action lies? I speak, of course, of the common law action, which the plaintiff here would have, not taking into consideration for any purpose an action under the statute.

Meredith, J.

Nor does there appear to me to be anything in the point urged, that because what was done was not merely an assault or some other minor offence, but is found to have been so atrocious a crime as rape, no action lies. Why should an action the less lie merely because the wrong done was greater—was even one of the gravest of crimes? Why the better lie if the crime had stopped short with the assault only? No good reason was suggested, and I cannot imagine any. I cannot doubt that the general rule, that a master may maintain an action for loss caused to him by personal injuries inflicted upon his servant, applies to this case quite as much as to the more familiar cases of assault and crimes of the lighter character.

It is true that in actions for seduction only, if rape only be proved, the plaintiff must fail: seduction and rape are inconsistent; but if there is any reasonable evidence upon which seduction only might be found, the case should go to the jury: see *Regina v. Doty*, 25 O. R. 362. This, however, is not a case of that kind. The plaintiff's pleadings, as amended under leave given by me, now plainly claim in the alternative, as the present practice permits; and he is, therefore, if I am right, entitled to recover whichever wrong might be proved and found.

The cases make it clear that a service *de facto* is enough to sustain the action. In this case there was clear evidence of such service of a more than ordinarily important nature, having regard to the position in life of the parties; and of substantial actual loss thereof.

But I am unable to find any authority for excepting a case of this kind from the general rule as to damages: indeed authority, such as it is, is against the plaintiff. See *Flemmington v. Smithers*, 2 C. & P. 292; and see also the observations of Parke, B., in *Newton v. Holford*, 6 Q. B.

921, at p. 927 ; and also *Gunter v. Astor*, 4 Moore 12, and *Hewitt v. Ontario Copper, etc. Co.*, 44 U. C. R. 287. Judgment.
Meredith. J.

It may be said that if the actions of breach of promise of marriage and of seduction are exceptions, why should this case not also be an exception. The whole wrong done is in a sense infinitely greater than in seduction even ; but it is different in the latter, for there the criminal law in such a case as this provides no punishment, whilst in the former it provides punishment far more likely than exceptional damages to prevent the crime ; and in seduction the woman has no action for the loss and suffering she sustains.

In the absence of authority for it I decline to depart in this case from the general rule as to the measure of damages ; and accordingly make no order as to the additional damages separately assessed by the jury.

I therefore direct that judgment be entered for the plaintiff in accordance with the findings of the jury, and \$250 damages, with costs of action. If either party desire it proceedings will be stayed as usual until a motion can be made in due course against the verdict and judgment or either.

As an earnest argument was made against the plaintiff's right to judgment upon the first finding of the jury, because the consent of the mother was obtained and the time of the leave of absence was not exceeded, I repeat that which I said during such argument, that that leave having been obtained for a colourable purpose, that leave having been obtained by fraud, cannot help the defendants, they can take no benefit from it. Leave to take a man's child to a social entertainment at a neighbour's house cannot help those who obtained it, according to the findings of the jury, falsely and deceitfully to enable them to take the child elsewhere and ravish her, rather it aggravates the wrong done ; the parents' confidence sought and their trust obtained with the intention and for the purpose of betraying it in the committing of an atrocious crime upon the person of the child entrusted to their care, and the effecting of their purpose in that way can but aggravate the wrong done.

Argument. The defendants moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered for the defendants or for a new trial.

In Michaelmas Sittings, 1894, before a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., *Clute* Q. C., supported the motion. The defendants were taken by surprise by the amendment made at the close of the case, and after the evidence had been all put in, and there should be a new trial on this ground. The claim as amended cannot be maintained. The defendants have already been criminally tried and acquitted on the charge of rape, and this constitutes a bar to a civil action therefor. The civil action is, as it were, merged in the criminal proceeding. The gist of the claim here is rape, and the judgment in the criminal case is that no rape has been committed. One might conceive a case where an action could be brought arising out of the criminal offence, but not where the criminal offence and the claim in the civil action are identical. Under sec. 866 of the Criminal Code it is expressly enacted that judgment under the Summary Convictions Act shall release the defendant from any civil proceedings in the same cause. The reason for the express enactment is because previous to the enactment there was no means of proving the result of the criminal trial. In *Masper v. Brown*, 1 C. P. D. 97, where, after a summary trial, a civil action was brought, the action was stayed, and also where a criminal proceeding is pending, a civil action for the same cause has been stayed: *Taylor v. McCullough*, 8 O. R. 309. This is merely making the rule in summary trials the same as in case of trial on indictment. The result of the authorities seems to be that so long as no criminal charge has been brought, or if brought the defendant has been convicted, a civil action may be maintained: *Higgins v. Butcher*, Yel. R. 89; *Lowe v. Horwarth*, 13 L. T. N. S. 297; *Wells v. Abrahams*, L. R. 7 Q. B. 554; *Roope v. D'Avigdor*, 10 Q. B. D. 412; *Wellock v. Constantine*, 2 H. & C. 146. No seduction has been proved, and no action lies for the enticing away, it having been with the mother's consent.

Mikel, contra. The amendment granted did not occasion to the defendants any surprise. It was apparent all through the trial that the ravishment of the daughter was the gist of the claim which was being litigated. The fact of the acquittal for the criminal offence is no bar to the civil action. This has been expressly laid down in *Crosby v. Leng*, 12 East 409. In that case the defendant was tried and acquitted on a charge of felonious assault. Subsequently, a civil action was brought to recover damages for the assault, and it was held that the acquittal on the criminal charge constituted no bar to the action. See also *Watt v. Clark*, 18 O. R. 602; *Stone v. Marsh*, 6 B. & C. 551; *White v. Spettigue*, 13 M. & W. 608.

December 21st, 1894. MEREDITH, C. J. :—

The plaintiff's claim, as set out in the pleadings, was for enticing away his daughter and seducing and carnally knowing her.

The action was tried at the Belleville assizes before Meredith, J., and a jury, and the evidence shewed that the connection with the plaintiff's daughter took place under such circumstances as amounted in law to rape, and the defendants pleaded and proved by the production of the record that they had been tried upon the charge of rape and had been acquitted, and it was contended on their behalf that the record of acquittal was conclusive against the plaintiff's right to recover. After the case had been closed, and after the addresses of counsel, the plaintiff was permitted to amend by alleging as an alternative cause of action the enticing away of his daughter, followed by the connection with her by force and against her will, and the consequent loss of her service. This amendment was allowed against the protest by the counsel for the defendants, but no application was made to admit further evidence on their behalf, nor upon the present motion is it shewn by affidavit, nor indeed was it suggested in argument, that the defendants were in any way prejudiced by the course taken at the trial.

Judgment.
Meredith,
C.J.

The jury found that the daughter had been enticed away, and they assessed the plaintiff's damages by reason of the assault and consequent loss of her services at \$250, and judgment was entered upon these findings for the plaintiff for the \$250.

The defendants now move to set aside the judgment entered upon these findings, and to enter judgment dismissing the action upon the ground urged at the trial to which I have already referred, or in the alternative for a new trial upon the ground that the amendment which was made ought not to have been allowed under the circumstances in which and at the stage at which it was allowed.

The case of *Crosby v. Leng*, 12 East 409, is conclusive against the defendant's contention. In that case the defendant after his acquittal upon an indictment for a felonious assault upon the plaintiff by stabbing, was sued by him in trespass to recover damages for the same assault. It was urged on behalf of the defendant that the record of his acquittal of the criminal charge having been put in that the action did not lie, but the contention was unsuccessful, and the defendant's rule to set aside the plaintiff's verdict and to enter a nonsuit, was discharged. LeBlanc, J., after pointing out that the cases which shew that the action lies after conviction of the defendant for felony, apply strongly in support of it after acquittal, says that it would be stronger for him, *i. e.*, the defendant, to allege that he was not properly acquitted, than in the other case it would be to allege that he had not been properly convicted, and he adds, at p. 415: "and here the defendant cannot say, against the record of acquittal, that this was a felony. After the question of felony has been determined, it leaves the trespass untouched: the defendant has committed the trespass which is the subject of the civil action; but the question on the indictment was whether he had not done something more."

Bayley, J., said, at p. 415: "The record of acquittal is at least conclusive evidence that the defendant was not proved guilty of the felony, and he cannot be questioned for the same offence again, but it leaves the civil remedy open."

The trial Judge, LeBlanc, J., had reported that the assault was proved to have been committed under such circumstances as in his judgment would have amounted to felony for stabbing, where if death had ensued the case would in law have amounted to murder, and that he would have so left the case to a jury on the trial of an indictment for the felony.

Judgment.

Meredith,
C.J.

Higgins v. Butcher, Yelv. 90, cited and relied on by Mr. Clute, was cited in this case also.

Crosby v. Leng, is referred to in the last edition of Addison on Torts, 7th ed., p. 76, as authority for the proposition that where there has been a civil injury to a private right which may also be the subject of criminal prosecution for felony the person injured discharges his duty of prosecuting the criminal offence before pursuing his civil remedy not only where the felon has been convicted, but also when the defendant has been acquitted.

So also in the case of libel. The prosecution of the defendant on an indictment is no bar to an action for the same libel whether the defendant was acquitted or convicted: Odger on Libel, 2nd ed., p. 522.

It is true that in the case of *Crosby v. Leng*, it does not seem to have been contended, as it is here, that the record of acquittal operated as an estoppel, but the reason for that was probably because such a position was thought to be untenable. It is impossible that the judgment in the criminal proceeding can operate as an estoppel against the plaintiff in the civil action. It would be manifestly unjust to conclude a person by a judgment in a proceeding to which he is not a party—(I am dealing with this case now as if the daughter were the plaintiff)—in which he was not admitted to examine witnesses, and in the conduct of which he could not take part, and therefore as to the daughter and the plaintiff the judgment of acquittal is *res inter alios acta*. A record of conviction even is not admissible as evidence of the same fact coming into controversy in a civil suit.

In *The King v. The Warden of the Fleet*, 12 Mod. 337, it

Judgment. was said by the Court, at p. 339, "for conviction at the
Meredith, suit of the King for battery, etc., cannot be given in
C.J. evidence in an action of trespass for the same battery,
nor *vice versa*."

And in *Castrique v. Imrie*, L. R. 4 H. L. 414, at p. 434, Lord Blackburn, says: "A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. See also Roscoe's N. P. Evidence, 16th ed., 205.

We must therefore hold that notwithstanding the acquittal of the defendants of the criminal charge the plaintiff's action lies, and that the record of the acquittal is not a bar, by way of estoppel, to it.

We think also that the amendment was properly allowed, and that in any case as the defendants do not shew that they were prejudiced by it, their objection founded on the allowance of the amendment ought not to prevail.

The motion is dismissed with costs.

G. F. H..

[CHANCERY DIVISION.]

RE MIMICO SEWER PIPE AND BRICK MANUFACTURING CO.

PEARSON'S CASE.

Company—Director—Solicitor—Right to Costs—Contributory—Set-off.

Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company :—

Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in Court conducted by him as solicitor for the company, but not in respect of business done out of Court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder.

Decision of the Master in Ordinary reversed.

Cradock v. Piper, 1 Macn. & G. 664, followed.

UPON a reference to the Master in Ordinary for the Statement. winding-up of the above company, James Pearson, a solicitor, who was a director and the president of the company, claimed to be allowed to set off against the amount of his liability as a shareholder, certain costs, fees, and disbursements for professional services rendered by him as solicitor for the company, while holding such offices of director and president.

February 2, 1895. THE MASTER IN ORDINARY :—

It is well settled law that “on the principle that a ‘person who has a duty to perform shall not place himself in a situation to have his interests conflicting with that duty,’ a solicitor being a trustee, executor or administrator, even though there be no express trust, or his partner on behalf of the firm of which he is a member, cannot (in the absence of an enabling clause) charge the trust estate with more than costs out of pocket for professional work done in or out of Court in connection therewith. And where a solicitor, being trustee, agrees with another solicitor that the latter shall do the trust business on agency terms, the benefit of such an agreement will enure for the trust estate :” *Cordery on Solicitors*, 2nd ed., p. 179. And this

Statement. rule has been held applicable to members of other professions who become trustees, when the remuneration is made by fees or commissions for the work done, or for services rendered to the trust estate. See as to surveyors, *Knott v. Cottee*, 16 Jur. 752; and as to brokers, *Arnold v. Garner*, 2 Phil. 231; and as to commission agents, *Sheriff v. Axe*, 4 Russ. 33. And bankers, when they act as trustees, have also been held to come within the equitable rule above indicated: *Crosskill v. Bower*, 32 Beav. 86.

In *Broughton v. Broughton*, 5 DeG. M. & G. 160, Lord Cranworth, L. C., in dealing with the case of a solicitor-trustee, said: "The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. * * The good sense of the rule is obvious, because it is one of the duties of the trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made."

And so far-reaching is the equitable rule in its application, that in *Re Corsellis*, 34 Ch. D. 675, a solicitor-trustee, who was a partner in a firm of solicitors who had made profit costs in certain legal proceedings, and in preparing leases and agreements respecting the trust estate, which had been paid to them by the parties dealing with the estate, was held not entitled to charge for such professional services; and himself and his partner were ordered to account for and pay over to the trust estate all

the profit costs received by the firm for the services mentioned. Statement.

This equitable rule has also been held applicable to directors of companies, because they also stand in a fiduciary relation to their shareholders, and are clothed with power to act for them, and are not, therefore, permitted to occupy a position which may conflict with their duty to the parties they represent, and whose interests they are bound to protect; for, as stated by a learned Judge, "constituted as humanity is, in the majority of cases, duty would be overborne in the struggle." And the rule has been applied in the case of directors of a railway company who afterwards became members of a construction company with which their railway company had made a contract for the construction of the road: they were made to account for the profits made by them in the construction company on the contract with the railway company of which they were directors: *Gilman, etc., R. R. Co. v. Kelly*, 77 Ill. 426. See further *Re Iron Clay Brick Manufacturing Co.*, 19 O. R. 113, and *Ex p. Larking*, 4 Ch. D. 566.

The rule was enforced in *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189, where a firm of stock-brokers, one of whose members was a director, had been employed to sell certain shares for the company, on the sale of which the firm realized a profit in the shape of a commission. The House of Lords ordered both the director and his partner to pay over to the trust estate the profit so made by them on the sale of the shares. And in giving judgment Lord Cairns said (p. 208): "I may meet the argument by a very familiar case, which occurs constantly in a Court of Equity, where a trustee, who is a solicitor, and a member of a firm, without authority, charges for his professional services and trouble, although he is a trustee. It has been held repeatedly that if that charge is made and not paid, it must be disallowed; that if paid, it must be refunded; and that which is to be refunded is the whole of the charge, and not merely the share of the trustee in the profits of the concern of which he is a member."

Statement.

This illustration, introduced into the case of a broker-trustee, who had been paid for his services by a commission, or fees, indicates, I think pretty clearly, that the equitable rule is of universal application, and must be held to be equally applicable to the case of a solicitor-trustee who is a director in a company, and who claims profit costs for professional services rendered to his company. The rule gives no permission to a solicitor-director to make a profit on services rendered, while it denies permission to a trade-director to make a profit on goods sold; the client, or the purchaser, is the company in each case; and the services, or the goods, are for the director's company, as a corporation, and not for his co-directors, as individuals.

Directors have been classed or defined in several cases as trustees, *quasi* trustees, managers, or commercial agents, for their company. But under whatever definition they may be classed, it is clear from the authorities that they occupy, like ordinary trustees, a fiduciary relation to their shareholders; and that relation brings them, I think, within the equitable rule which debars them from making a personal profit out of their dealings with their company; and it matters not what the calling or business or profession of the director may be; the rule is clearly of universal application in regard to sales of goods, or property, or personal services, by a director to his company, unless sanctioned according to the formalities, or in the manner, prescribed by the law.

It is beyond question that a director who, as solicitor for his company, charges professional fees for his services as such company's solicitor, cannot, as indicated in *Broughton v. Broughton*, 5 DeG. M. & G. 160, perform one part of the duty he is bound to render to his trust, namely, that of "seeing that no improper charges are made" in his bill of costs.

For these reasons I must disallow the claim for profit costs, but will refer the bills of costs, in so far as they contain items of disbursements, to the taxing officer, and the amount certified by him will be allowed as a set-off to the party's liability as a contributory.

James Pearson appealed from the order, decision, or report of the Master in Ordinary placing him upon the list of contributories. Argument.

The appeal was argued before MACMAHON, J., in Court, on the 28th February, 1895.

J. H. Denton, for the appellant. The directors of a joint stock company are not trustees in the sense that a trustee, under a will, is trustee for his *cestui que trust*. Directors are rather co-managers for the shareholders: *In re Fuaire Electric Accumulator Co.*, 40 Ch. D. 141; 59 L. T. N. S. 918. The appointment by the directors of one of themselves to a position of profit in the company is not illegal. There is nothing to render such appointment illegal at common law, though the circumstances might involve a breach of trust, as, for instance, by appointment to office with an extravagant remuneration: *Healey's Law of Joint Stock Companies*, 3rd ed., p. 159. The appellant is not charged with any breach of trust, nor can any such charge be sustained. In *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476, there was held to be no objection to an inspector of an insurance company occupying the position of president. But even admitting, for the sake of argument, that directors are trustees, it does not follow that a trustee cannot charge profit costs. A solicitor-trustee can charge costs against the estate in actions or suits in which he acts not only for himself, but for co-trustees: *Cradock v. Piper*, 1 Macn. & G. 664; *Re Corsellis*, 34 Ch. D. 675; *Re Barber*, *ib.* 77; *Strachan v. Ruttan*, 15 P. R. 109. And in *Re Corsellis*, 34 Ch. D. 675, it was held that such costs may be recovered, not only in hostile litigation, but also in other matters.

Frank Denton, for the liquidator. The law is clear and has been long established that a trustee-solicitor cannot charge profit costs, on the principle that he has a duty to perform in the trust that may conflict with his personal interests, and even his partner is excluded from profit costs: see *Cordery on Solicitors*, 2nd ed., p. 179. And this is a

Argument. general rule that applies to other professions and occupations: see *Sheriff v. Axe*, 4 Russ. 33; *Arnold v. Garner*, 2 Phil. 231; *Knott v. Cottee*, 16 Jur. 752. It has been held that directors of joint stock companies are trustees: *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450, and therefore they come within the rule. It was held in our own Courts in *Re Iron Clay Manufacturing Co.*, 19 O. R. 113, as well as in England in *Ex p. Larking*, 4 Ch. D. 566, that a director cannot, on any account, make profits out of dealings with his company. Here the appellant was not only a director, but also the president, and as such had greater powers and influence than his co-directors. The recent decision of Rose, J., in *Re Ontario Express Co.*, 25 O. R. 587, is not in point, for there the question turned on the fact that the Legislature, after the appointments had been made and salaries fixed by by-law, had confirmed the same. The only apparent right the appellant here has is under the principle laid down in *Cradock v. Piper*, 1 Macn. & G. 664, which has been severely criticized. But in that case there were co-trustees sued, of whom the solicitor was only one, and on that account only he was entitled to profit costs, limited, however, to what were earned in litigation; while in this case there is but one defendant (or plaintiff, as the case may be), and that the corporation. The trustees (directors) are not parties to the action, as they would be if they were sued or were suing as individuals representing a trust estate, and *Cradock v. Piper* does not therefore apply, and should not be extended to meet the wishes of the appellant. Where a trustee is suing, or being sued, he is always liable to have to pay costs personally, and that liability is, of itself, more or less of a safeguard to the trust estate; but where a corporation sues, or is sued, there can be no judgment for costs against the trustees (directors).

March 19, 1895. MACMAHON, J.:—

In *Re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450, Sir George Jessel, M. R., said: "Directors have sometimes

been called trustees, or commercial trustees, and sometimes they have been called managing partners; it does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it."

Judgment.

MacMahon,
J.

The quotation from Cordery on Solicitors, 2nd ed., p. 179; the excerpt from the judgment of Lord Chancellor Cairns in *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189; and the reference to the decision of the Court of Appeal in *Re Corsellis*, 34 Ch. D. 675, in the judgment of the learned Master in Ordinary, are conclusive on the point that where a solicitor is a trustee, executor, or administrator, neither he, nor his partner, on behalf of the firm of which he is a member, can charge the trust estate with more than costs out of pocket for professional work done in connection therewith.

The by-laws of the company provide, (No. 9)—"The affairs of the company shall be under the control and management of eight directors, five of whom shall form a quorum," etc. No. 19 provides that "the board shall appoint one or more solicitors, who shall transact all professional business of the company as the directors may require."

Mr. Pearson was one of the directors and president of the company, and was appointed the solicitor for the company on the 15th May, 1893, and in his professional capacity was acting for his co-directors or co-trustees, and in that case he stands in a different position from a sole trustee who is a solicitor, or where a partner acting on behalf of the firm of which the trustee is a member seeks to charge the trust estate for professional services. The distinction is drawn and the exception to the general rule, if not actually created, is clearly formulated by Lord Chancellor Cottenham in *Cradock v. Piper*, 1 Macn. & G. 664, where, at the conclusion of the argument, he says (p. 673): "A trustee, as trustee, is not to make his office a

Judgment.
MacMahon,
J.

source of remuneration ; but the question is, whether acting for other parties is an acting arising out of his office. If A. is a trustee of a fund, and employs himself, this is clearly within the rule ; but it is not the same thing if there are other parties, and they come and employ him, though this employment may arise accidentally out of his being a trustee." And in his judgment Lord Cottenham says (p. 679): "So far, therefore, the rule, as laid down and acted upon, is confined to cases in which the business or employment of the solicitor is the proper business or employment of the trustee ; but it is no part of the business or employment of a trustee to assist other parties in suits relative to the trust property. If, therefore, the trustee act as solicitor for such other parties, such business or employment is not any business or employment of the trustee ; and the rule as hitherto laid down does not apply, and no case has yet arisen raising the question, whether the rule ought to be extended to costs of other parties for whom the trustee had acted as solicitor. * * I am therefore of opinion that the rule does not extend beyond costs of the trustee where he acts as solicitor for himself."

Craddock v. Piper was discussed in *Re Barber*, 34 Ch. D. 77, and after reviewing the authorities, Chitty, J., says (p. 83): "The result, therefore, is that, on the reported decisions, *Craddock v. Piper* stands unimpeached."

And Cotton, L. J., in *Re Corsellis*, 34 Ch. D., after discussing at length the general rule, says (p. 681): "From the rule I have stated one exception was established by *Craddock v. Piper*:—that is to say, where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense ; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee. For that there is an obvious

reason—that it is not the business of a trustee, although he is a solicitor, to act as solicitor for his co-trustee.”

Judgment.

MacMahon,
J.

The directors, with full knowledge of his position, having appointed Mr. Pearson solicitor for the company, I should have been inclined to allow him his costs for business done out of Court, as well as for professional services performed in an action or in a suit. But the rule is laid down in *Craddock v. Piper*, that where a trustee-solicitor is entitled to his costs, he is limited expressly to the costs incurred in respect of the business done in an action or in a suit. The reason for this limitation is fully explained by Cotton, L. J., in *Re Corsellis*, 34 Ch. D. at p. 682.

The appeal must be allowed with costs. But the order will contain a provision limiting the costs to those which the appellant is entitled to tax against the company as above stated.

E. B. B.

[CHANCERY DIVISION.]

HOGABOOM V. GRAYDON.

*Bills of Sale and Chattel Mortgages—Transfer from Husband to Wife—
 “Actual and Continued Change of Possession”—R. S. O. ch. 125, sec.
 1—55 Vict. ch. 20, sec. 3—57 Vict. ch. 37, sec. 39.*

A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continued change of possession open and reasonably sufficient to afford public notice thereof as required by the Bills of Sale Act.

Statement. THIS was a motion before the Chancery Divisional Court by way of appeal from the judgment of MEREDITH, J., allowing an appeal from the Master in Chambers, in an interpleader issue, which was tried summarily in Chambers, and in which the claimant Sarah Jane Graydon, wife of R. A. Graydon, the execution debtor, was the plaintiff, and the executors of G. R. Hogaboom, deceased, the execution creditors were the defendants.

The facts of the case are stated in the judgment of the Master in Chambers, which was as follows:—

October 26th, 1894. THE MASTER IN CHAMBERS:—

This is summary trial of an issue in Chambers; the issue is to try the validity of the claim of the wife of the judgment debtor, to certain furniture seized by the sheriff under a writ of execution issued herein against the goods and chattels of the defendant.

Mrs. Graydon claims to have purchased the furniture in question in this issue from her husband during Christmas week last year, paying therefor the sum of \$100 cash. The evidence given before me supports this claim fully, but counsel for the execution creditors contended that there being no immediate delivery of the furniture by the hus-

band to the wife followed up by actual and continued change of possession, and there being no bill of sale as required by sec. 5 of R. S. O. ch. 125, the sale was void as against creditors of the husband; and further, that the evidence established fraud on the part of the parties and therefore the sale was void as against the execution creditors.

Judgment.

Master in
Chambers.

The evidence as already stated is sufficient to shew an actual purchase by Mrs. Graydon from her husband. Both husband and wife lived together in the same house, not only subsequent to the sale but prior to it,—the acts of ownership were therefore by both. There is no doubt whatever in my mind that upon the payment of the \$100 the intention was that the furniture should become the separate property of the wife in the same way as the other furniture—wedding gifts, etc.—which belonged to her, and which was in her possession. The evidence of Mr. Standish supports this view, I think. As to the immediate delivery—the goods were already in possession of the wife, but not the title, and when she obtained the title by paying the purchase money, and the goods being already in her possession, an immediate delivery so far as a delivery of an article already in one's possession can be made, was made. The intention at the time of the sale was that both the property in the goods and the possession of them should pass at once to the wife. Following the decisions of the Judges of the Court of Appeal in *Ramsay v. Margrett*, [1894] 2 Q. B. 18, I hold that the transaction was one that does not come within the Act, R. S. O. ch. 125, and having found that it was *boná fide* and for value, that the claimant is entitled to the goods.

[The learned Master then proceeded to consider further the question of fraud, holding that there was none established, and referring, also, in the claimant's favour, to the cases of *Kent v. Kent*, 20 O. R. 445, 19 A. R. 352, and *Kilpin v. Ratley*, [1892] 1 Q. B. 582.]

Argument. The execution creditors then appealed to the Judge in Chambers, and the appeal was argued on November 2nd, 1894, before MEREDITH, J.

W. R. Riddell, for the execution creditors.

A. Cassels, for the claimant.

November 24th, 1894. MEREDITH, J.:—

The learned Master in Chambers saw and heard the witnesses and gave credit to their testimony: he found, apparently unhesitatingly, that the alleged transaction actually took place, in good faith, without any intention of interfering with the rights of creditors present or future. And I can perceive no just ground or good reason for differing from his conclusions in this respect. The story is by no means improbable; it would rather be unlikely that persons in the position of the claimant and her husband would attempt a fraud of so petty a character. A fair price for the furniture was actually paid by the wife out of money given to her by her mother. The few answers of the claimant on her examination for discovery, relied on by the execution creditor, amount really to this only:—That she desired to be the owner of the furniture only so that it would be hers, no matter what the future might bring forth: taken in connection with the whole evidence they mean no more than that which every purchaser might say:—“I want the property to be mine, not yours, subject to my disposition, not yours; liable to pay my debts, not yours, if you or I ever have any.” There is nothing like a successful attack upon the transaction, under the Statute of Elizabeth, even as interpreted in this Province (R. S. O. 1887, ch. 96, sec. 3), disclosed in the evidence.

Then is the sale void, as against the execution creditors, under the provisions of the Act respecting Mortgages and Sales of Personal Property, and the amendments thereto? That is to say (1) is the transaction one within the Act; and, if so, (2) was there an immediate delivery followed

by an actual and continued change of possession of the goods sold, such as the Act and amendment require ? Judgment.
Meredith, J.

[The learned Judge then referred to a prior unreported judgment of his in *Miller v. Tomlinson*,* in which he had considered the authorities, and continued:]

Is the sale one within the provisions of the Act at all? If the property be such that it is not capable of immediate delivery followed by actual and continued change of possession, the cases have settled it, so far as my judgment sitting here goes, that it is not; that, in effect, there must be read into the Act after the words "an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold," the words "where such delivery and change of possession are possible." I am unable yet to perceive why the words of the Act might not have been given their full meaning, there being, as I said in the *Miller* case, the not very oppressive alternative of taking and filing a bill of sale. But I am not aware of any case in which it has been held that because it may be inconvenient, even highly inconvenient, to make such a delivery and change of possession, the Act is not to apply, and I decline to be the first to interpolate, in effect, the additional words "or inconvenient," or "or where the parties are living or carrying on business together": see *Ex parte Parsons*, 16 Q. B. D. 532.

Transactions between husband and wife are those in which there is perhaps the greatest danger of that which this Act and other Acts were designed to prevent—to protect creditors against; and it seems to me that, if such transactions were excluded, very much of their purpose and usefulness would be defeated and ended.

It may be inconvenient, highly inconvenient, to husbands and wives that, in cases of sales or mortgages of their household goods from one to the other, there must be an actual and continued change of possession or else a bill of sale or chattel mortgage filed; but the Act is more

* Interpleader issue tried at the London Autumn Non-jury Sittings, in November, 1891, unreported.

Judgment. or less inconvenient and a source of expense to all who
Meredith, J. come within its provisions, and if the case of husband and wife is to be an exception, why not the case of any other buyer and seller, or mortgagee and mortgagor, who happen to be living together?

The Imperial Bills of Sales Act, 1878, 41-42 Vict. ch. 31, made express provision as to the meaning of the words "personal chattels," in effect excluding, with certain exceptions, articles incapable of complete transfer by delivery.

I hold that this case is within the provisions of our Acts.

Then was there such a delivery and change of possession as they required?

In the *Miller* case my conclusion from the cases was that the change is to be an actual change of possession not a constructive or legal change, but that the Act did not require that it should be an open or notorious change; and that the change needed to be only such as the nature of the transaction and the circumstances of the case required.

But since then the Act has been amended, and, when this transaction took place, expressly required that the change of possession be open and reasonably sufficient to afford public notice thereof.†

If there were in this case anything more than a mere constructive change of possession, it certainly was not a change of the character now required: see *Steele v. Benham*, 84 N. Y. 634; *Sumner v. Dalton*, 58 N. H. 295, and *Wilson v. Hill*, 30 Pac. R. 1076.

I am not pressed very much by recent English cases, for, since the Bills of Sale Act of 1882, Imp. 45-46 Vict. ch. 43, the purposes of the legislation there have been apparently much changed, the "mischief" struck at is not the same; the bill of sale is not only void as against creditors but is avoided—where the provisions of the Act are not complied with—altogether: see the judgment of the then Lord Chancellor in *Charlesworth v. Mills*, [1892] A. C.

† See 55 Vict. c. 26, s 3; 57 Vict. c. 37, s. 39.—REP.

231, and of Lord Justice Davey in *Ramsay v. Margrett*, ^{Judgment.} [1894] 2 Q. B. 18. In the latter case the Lord Justice ^{Meredith, J.} asks (at p. 27) the question: "Was it necessary that there should be any change in the ostensible possession?" and then citing from a judgment of the present Lord Chancellor in the former case answers it in the negative, saying that he understands that the effect of that judgment is that you need not enquire who had the apparent possession, but only whether there was possession between the person giving it and the person taking it: see also *Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206.

And in the present state of the law respecting property of married women one can understand a judgment holding, in a case like this, that the husband was not in "possession, or apparent possession,"—the words used in the 8th section of the Imperial Act of 1878, repealed by the 15th section of the Act of 1882,—either before or after the transaction; but it would be very hard to understand how it could be held that the requirements of our Acts were in this case complied with.

Our Acts required, for the benefit of creditors, purchasers, and mortgagees in good faith, an open change of possession reasonably sufficient to afford public notice of it. And there was not such in this case.

The Imperial Acts must be carefully compared with our Act, before following the judgments of the English Courts. There are many material points of difference in the statute law upon the subject there and here.

The case of *Kilpin v. Ratley*, [1892] 1 Q. B. 582, is not in point. The question there was whether there was a sufficient delivery of the goods to complete a verbal gift of them under the common law as expounded in *Cochrane v. Moore*, 25 Q. B. D. 57; a very different thing, indeed, from an immediate delivery followed by an actual and continued change of possession, which change must be open and reasonably sufficient to afford notice thereof.

I would be, but for the amendment to the Act, more pressed with the trend of the later cases in our own Courts

Judgment. which, as I understood it, I endeavour to shew in the
 Meredith, J *Miller* case, and, following it, would probably have reached
 the conclusion that there was as complete a change of possession as the nature of the transaction required or reasonably admitted of, and, though not open, notorious or publicly apparent, yet enough ; but the amendment referred to prevents that.

The appeal must be allowed, and the issue—on this ground only—found in favour of the execution creditor.

In the exercise of my discretion over the costs I award none to either party from the other ; there will be no order as to any of the costs throughout ; that is, between the parties to this issue.

The claimant now moved before the Divisional Court by way of appeal from this decision on the ground that the sale of goods in question did not come within section 5 of the Act respecting Mortgages and Sales of Personal Property, as interpreted by 55 Vict. ch. 26, sec. 3 (O.), or that if the said Act did apply, the requirements of it had been fulfilled by immediate delivery followed by such actual and continuous change of possession as was open and reasonably sufficient to afford public notice thereof.

The motion was argued on December 19th, 1894, before BOYD, C., and FERGUSON, J.

A. Cassels, for the claimant. The Bill of Sales Act does not apply to husband and wife living together, because there can be no delivery as between them, and no actual change of possession : *Gunn v. Burgess*, 5 O. R. 685 ; *Totten v. Bowen*, 8 A. R. 602 : see also *Grant v. Grant*, 34 Bea. 623 ; *Kilpin v. Ratley*, [1892] 1 Q. B. 582 ; *Ramsay v. Margrett*, [1894] 2 Q. B. 18 ; *Scribner v. McLaren*, 2 O. R. 265, 270, 12 A. R. 367, 370, 14 S. C. R. 77, 80 ; *Lush on Husband and Wife*, p. 204 ; 55 Vict. ch. 26, sec. 3.

W. R. Riddell, for the execution creditors. There must be an ostensible change of possession. Since 1882, the object of the Legislature in England has been to protect

the mortgagor against the acts of the mortgagee,—not to protect the creditor of the mortgagor, while our Act is to protect the creditor of the mortgagee: *Charlesworth v. Mills*, [1892] A. C. 231. Under the English Act there is no necessity for any ostensible change of possession; with us there must be an open ostensible change of possession: see *Johnson v. Cline*, 16 O. R. 129; *Snarr v. Smith*, 45 U. C. R. 156; *Pettigrew v. Thomas*, 12 A. R. 577. Argument.

January 10th, 1895. BOYD, C.:—

Between persons competent to contract and to hold personal property the Act requires that a sale shall be manifested by registered writing (as against creditors of the purchaser) unless there is a visible and public change of possession of the goods and chattels sold. I cannot read the statute as making any exception in favour of a married woman; if a transaction of sale takes place between her and her husband as to furniture, if she and the husband continue to live together as before, her right must be manifested and protected by a registered instrument, if she wishes to hold as against his creditors.

If her capacity to hold as a *feme sole* has been increased by legislation, the Court should not add to that by giving her extraordinary privileges such as that claimed upon this contention. She ought not to be able to hold personal property in the apparent possession of the husband, or in the apparent joint possession of husband and wife, if such possession does not satisfy the terms of the Bills of Sale Act. The wife cannot be said to be in sole or exclusive possession of this furniture regarding it as a matter of public observation as required by 55 Vict. ch. 26, sec. 3; the statute has not been satisfied, and I would affirm the judgment of my brother Meredith.

FERGUSON, J.:—

I can see no ground for saying that this case does not fall under the provisions of the Act respecting Mortgages and Sales of Personal Property.

Judgment.
Ferguson, J. I have examined the cases and authorities referred to by counsel and the farthest that they go, as I understand them, towards supporting the contention of the claimant, is to shew that, since the passing of the Acts respecting the property of married women, the husband and wife are not in matters of this kind to be considered, as formerly, one person, but two persons just as if they were two men, and that in the case of a purchase of goods by the wife from the husband, and payment for them, they living together in the same house both before and after the purchase of the goods, so that one could not say which of them was in the actual possession of the goods, the rule of law applies, that where the possession is doubtful it is attached to the title to the property and would be considered in such a case to be in the married woman who had purchased the goods and paid for them. See the case *Ramsay v. Margrett*, [1894] 2 Q. B., at p. 25, which is the latest of the cases that I have seen.

But this, as I think, falls very far short of shewing that in such a case there has been an actual and continued change of possession of the goods, and such a change of possession as is open, and reasonably sufficient to afford public notice thereof, as required by our statutes.† Then there being no writing filed, or that could be filed or registered, I think the claimant's contention must fail.

† See 55 Vict. c. 26, s. 3; 57 Vict. c. 37, s. 39.—REP.

[CHANCERY DIVISION.]

GEMMILL V. NELLIGAN.

Dower—Mortgage for Money Borrowed—Bar of Dower—Sale of Mortgaged Land—Right to Dower in Surplus.

Where lands mortgaged to secure a loan have been sold by the mortgagee, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus, computed on what would be the full value of the land, if unencumbered.

Pratt v. Bunnell, 21 O. R. 1, not followed so far as the reasoning and dicta therein are opposed to the above decision.

THIS was a motion by way of appeal from an order of Statement.
STREET, J., on a motion by a mortgagor for payment out of moneys in Court representing the surplus proceeds of the sale of mortgaged lands, less such proportion as was necessary to secure his wife's inchoate right of dower.

The facts are fully set forth in the judgment of ROBERTSON, J.

The motion was argued on December 11th, 1894, before ROBERTSON and MEREDITH, JJ.

W. H. Blake, for Catharine Nelligan, wife of the mortgagor, appellant. We say we are entitled to one-third, to be calculated on the whole value of the land, as found by the sale. We are entitled to have that retained in Court till the mortgagor dies. The mortgage was not given for unpaid purchase money, but to secure a loan. The property was bought in 1871, and it was free from incumbrance when this loan was contracted in 1884. The property was sold in two parcels, part in 1889 and part in 1894.

[MEREDITH, J.—I thought *Re Robertson, Robertson v. Robertson*, 25 Gr. 276, 486, settled that the widow was entitled to dower out of the whole, and that the subsequent legislation has been to strengthen, not weaken, the wife's position.]

I cannot put the argument for the widow with anything like the same force as *BOYD, C.*, in *Re Croskerry*, 16 O. R.

Argument. 207. I refer also to *Doan v. Davis*, 23 Gr. 207; *Lindsay v. Lindsay*, 23 Gr. 210; *Re Robertson*, 24 Gr. 442; *Re Robertson*, *Robertson v. Robertson*, 25 Gr. 276, 486; *Re Hopkins*, *Barnes v. Hopkins*, 8 P. R. 160; *Re Hague*, *Traders Bank v. Murray*, 14 O. R. 660; *Ayerst v. McClean*, 14 P. R. 15; *Pratt v. Bunnell*, 21 O. R. 1; *Martindale v. Clarkson*, 6 A. R. 1; *Blong v. Fitzgerald*, 15 P. R. 467; *Gray v. Coughlin*, 18 S. C. R. 553. The Act is R. S. O. ch. 133. *Pratt v. Bunnell* is, so far as it applies to this case, *obiter dicta*. There the mortgage was given for unpaid purchase money, here it was given to secure a loan. The reasoning in *Pratt v. Bunnell* is broad enough to cover our case, but it is broader than was necessary to decide the case before the Court, and the reasoning may be rejected so far as it goes beyond the case of a mortgage for unpaid purchase money. No notice, moreover, is taken of section 7 of the Act. The Act certainly was not intended to diminish the rights of the widow, as determined by the cases. As to reviewing the decision of a Court of equal jurisdiction, when it is contrary to a long line of authorities: see *In re Buller's Settlement*, 8 Jur. N. S. 205; also Ram on Legal Judgments, at p. 89.

Leighton McCarthy, for the husband, contra. *Pratt v. Bunnell*, 21 O. R. 1, is a binding decision of the Queen's Bench Divisional Court. It specifically overrules *Re Robertson*, *Robertson v. Robertson*, 25 Gr. 276, 486. It is now the law here. I refer to an article in 11 C. L. T. 281, where the question of dower in mortgage lands is discussed: also to *Thorpe v. Richards*, 15 Gr. 403; the dissenting judgment in *Re Robertson*, *Robertson v. Robertson*, supra, and *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218.

Blake, in reply. I refer to 27 C. L. J. 449. As to differing from a Court of co-ordinate jurisdiction, see *per* Jessel, M. R., in *Gathercole v. Smith*, 44 L. T. 440.

[MEREDITH, J.—But are we Courts of co-ordinate jurisdiction? Is not *Pratt v. Bunnell* the judgment of this High Court of Justice?]

February 21st, 1895. ROBERTSON, J. :—

Judgment.

Robertson, J.

This is an appeal from the order of Street, J., dated 29th June, 1894, in this action, brought by the plaintiff as mortgagee, against the defendant Joseph Nelligan, on a mortgage made by him, in which his wife Mary joined to bar her inchoate right to dower, to secure the repayment of money borrowed by the mortgagor. The lands have been sold under the mortgage, and there is now in Court \$1,082.57 surplus after paying off the mortgage and costs. The sale realized \$4,270, and the order of Street, J., is that the appellant Mary is only entitled to one-third of the surplus, and not to one-third of the whole value of the land.

The grounds of appeal are as follows :—

1. The learned Judge has not adopted the correct principle of computation as to the dower of Mary Nelligan.

2. The moneys in Court, and which were the subject of the application to him, were a portion of certain moneys realized from the sale of the lands of the said Joseph Nelligan, in which lands the said Mary Nelligan had an inchoate right to dower.

3. Her inchoate right to dower extends to the proceeds of the said lands, and is only affected to the extent to which by joining in certain mortgages she barred her dower.

4. The said mortgages having been paid and satisfied, her dower right is to be computed upon the whole value of the land, as none of the mortgages were given for unpaid purchase money, and not merely upon the balance left after satisfying the said mortgages.

5. Upon such computation her inchoate right to dower extends to the whole surplus, and the learned Judge should have so found.

The mortgage in question was made in 1884, and the action was commenced in 1888, and the land was not in a state of nature and unimproved at the time of the mortgage. The Act in force at the date of the mortgage

Judgment. was 42 Vict. ch. 22 (O.), and sections 1, 2 and 3 are now consolidated in R. S. O. 1887, ch. 133, sections 5, 6 and 7, and are the sections which govern in this case. Taking the original Act, section 1 declares: "No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument."

Robertson, J. Section 2: "In the event of a sale of the land comprised in any such mortgage or other instrument, under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold."

Section 3: "A mortgagee or other person holding any money out of which a married woman shall be dowable under the preceding sections of this Act may pay the same into the Court of Chancery to the credit of such married woman and the other persons interested therein. (2) The Court of Chancery, or any Judge thereof, may, on a summary application by petition or motion, make such order for securing the right of dower of any married woman in any money out of which she may be dowable as may be just."

The mortgagor Joseph Nelligan is now a person of unsound mind, not so found by inquisition.

In *Pratt v. Bunnell*, 21 O. R. 1, Street, J., who delivered the judgment of the Court, Falconbridge, J., sitting with him, decided that in all cases, whether the mortgage was given to secure purchase money or for a loan, the wife was only entitled to one-third of the surplus arising from the sale of the mortgaged premises, reversing the judgment of

Armour, C. J., who held that to the extent of one-third of the value of the mortgaged premises, as ascertained by the sale, this should be paid into Court, there to remain to answer the dower of the wife of the mortgagor in case she should become entitled thereto, and subject to such dower, to belong, with any surplus money over and above such one-third, to the assignee of the mortgagor. The respondent relies on this case, and claims that we are bound by it. Judgment.
Robertson, J.

This decision of Street, J., has given rise to a good deal of discussion, it having dissented from the judgment of Ferguson, J., in *Re Hague, Traders Bank v. Murray*, 14 O. R. 660, who held that the wife was entitled to dower in the full value of the land out of the balance of the purchase money remaining after the payment off of the mortgage, on the authority of *Re Robertson*, 24 Gr. 442, afterwards affirmed by the full Court, Blake, V. C., dissenting: 25 Gr. 486. Street, J., also dissented from the opinion of Patterson, J. A., in *Martindale v. Clarkson*, 6 A. R. 1, where that learned Judge says, at p. 6: "To such dower," (namely, dower out of an equitable estate of which the husband does not die seized), "the Legislature applies the rule adopted by the Court of Chancery in *Robertson v. Robertson*, 25 Gr. 486, estimating it upon the whole value of the land, and not on the surplus over the incumbrance, but it extends the rule to cases not reached by that decision when it recognizes the right of the wife where the sale takes place in the lifetime of the husband." He also dissents from the judgment of the Chancellor in *Re Croskerry*, 16 O. R. 207, who reviews all the cases up to that time, and concludes that the clear meaning of the Act now under consideration is that it contemplates the contingency of a partial or total assignment by the husband of the equity of redemption as not impairing his wife's inchoate right to dower, and the learned Chancellor says, at p. 213: "By section 6 the extent of this dower is to be the same as if the land had not been sold; that means, I think, to the same extent as if the mortgage had been paid off or

Judgment. redeemed. It is intended to supply the measure of her right as regards the surplus and to shew that the computation is to be based on the value of her dower in the entire estate, and not merely that of the equity of redemption."

On page 7 of his judgment my learned brother Street puts this hypothetical case: "If the mortgagee sells eighty acres and thus satisfies his mortgage, the wife loses her dower in the eighty acres. The remaining twenty acres is reconveyed to her husband, and she has her dower in it, but dower in twenty acres, not one hundred acres." With great respect I answer that by the fact that this is not the case provided for by the Act, any more than if the whole of the land was sold in order to realize enough to pay off the mortgage, in which case the wife might have a claim as surety for the value of her dower in the whole land, to be paid out of any other assets of her husband should she become entitled, as pointed out by Proudfoot, V. C., in *Re Robertson*, 24 Gr., at p. 447, where he says: "As a surety, she is entitled to complete indemnity * * If the mortgage were to exhaust the mortgaged property, and she were seeking indemnity out of the assets of her husband, there might be ground for contending that she should only claim as any other creditor of her husband, but the amount of her claim would be computed on the whole value of the mortgaged property. The cases shew that she is only a surety for the debt, and if her estate is exhausted in paying the debt she should have a right to make the debtor's estate pay it."

Another case is suggested following the one above referred to, in these words (21 O. R., at p. 7): "If the mortgagee sells the whole one hundred acres, his mortgage money is paid in full, and he has a surplus of \$200; this is the case provided for specially by the 6th section. That section directs that in such a case the wife shall be entitled to dower in this surplus, not on the whole value of the land, to be paid out of this surplus, to the same extent as she would have been entitled to dower in the land from which

the surplus was derived, if it had not been sold. To apply Judgment.
this to the case I have put, the widow is entitled to dower Robertson, J.
in the \$200 surplus to the same extent as she would have
been entitled to dower in the twenty acres from which
the surplus was derived, if it had not been sold." And
then the learned Judge goes on to say: "The meaning
of the expression 'dower' is not to be extended so as to
mean any thing more than the interest or estate described
by that word, and when the Act says that the wife is to
have dower in money, which is taken to represent the
land which has produced it, it cannot mean that she is to
have a greater share of the money than as doweress, she
would have been entitled to in the land." With great
respect, I am obliged to differ with my learned brother.
It is true the Act makes use of the word "dower," and
there is no doubt as to its meaning; but when the Act
goes further and says dower "to the same extent as she
would have been entitled to dower in the land from which
such surplus purchase money shall be derived, had the
same not been sold," I venture, with great respect, to
express the opinion that the word "dower" is not
intended to be limited only to that particular surplus,
but to the value of the dower in the whole mortgaged
property; if it was not so intended, what sense is there
in the words which follow and are a part of the same
sentence, "to the same extent as she would have been
entitled to dower in the land from which such surplus
money shall be derived, had the lands not been sold"?
"As dower in the surplus only," is quite a different thing,
and is well understood to mean one-third of that surplus
for life, but add the words "to the same extent," etc., and
it is made clear that the "dower," meant is the "dower"
she had at the time she executed the mortgage, distin-
guishing between a mortgage for purchase money and one
for a direct loan. In the former case her dower, on the
authorities, would attach only to so much of the lands as
might be paid for at the time of purchase, which distinc-
tion was doubtless intended by the Legislature to be and

Judgment. remain undisturbed; had any thing else been meant, it
Robertson, J. would have been easy to have found words to express the intention in clear and unmistakable language. Again, what warrant is there for concluding, as my learned brother has done, that the \$200 surplus in the case put by him, was derived from any particular part of the property sold, twenty acres, or otherwise? It is a surplus after paying the mortgage money which has been derived from a sale of the whole of the lands and not any particular part thereof.

But after all the opinion expressed in *Pratt v. Bunnell*, in so far as it relates to a case such as I am now considering, is really *obiter*, inasmuch as the question there arose on the surplus of money received after a sale of lands under a mortgage given for the purchase money, and not for a loan. So that the decision in regard to a question like the one now under consideration, is not binding on this Divisional Court, where the question is raised on a mortgage given for a direct loan; and I therefore, while I have great respect for the opinion of my learned brothers who constituted the Court in that case, prefer to follow my own, supported, as it is, by numerous authorities, not only of single Judges, but of the full Court.

I therefore am of the opinion that the appeal in this case must be allowed, and the order appealed from varied, so as to declare that Mary Nelligan, the wife, is entitled to have her dower on the whole value of the land covered by the mortgage, as ascertained by the sale, paid into Court out of the surplus proceeds, after payment of the mortgage, to the extent of such surplus, there to remain to answer her dower in case she shall become entitled thereto. And she should have her costs, not only of the original motion, but of this appeal, first to be deducted from such surplus.

MEREDITH, J.:—

It is a matter for observation that the contract here is between the husband and wife; that the husband, for

whose accommodation the wife joined in the mortgage, is ^{Judgment.} setting up that very act alone to defeat the right to dower ^{Meredith, J.} which otherwise she admittedly would have ; and the order now in review is based upon and gives effect to such a contention so made. Are we sitting here bound to give effect to it ?

The great preponderance of judicial opinion answers "no" ; no, if the contract were between the husband's assignee, or even his creditors, and the wife ; and there is, so far as I am aware, no reported case which is an authority for the making of the order in question. *Pratt v. Bunnell*, 21 O. R. 1, was a case in which the mortgage had been given to secure payment of part of the purchase money ; so that the transaction could not be looked upon as a mere pledge of the wife's interests for the husband's debts ; and the decision of that case is quite in accord with the cases ; though the reasons upon which the decision is based are, and admittedly are, in direct conflict with them.

It would require very strong reasons, indeed, to warrant us in supporting an order which is in direct conflict with all authority ; and which would unsettle the law upon this important real property question which was finally settled by the case *Robertson v. Robertson*, 25 Gr. 486, sixteen years ago. Sitting here I would, whatever view I might personally take of the question, feel bound by the authority of the cases to give effect to the wife's claim, leaving it to the Court of Appeal to say, if it be so, that the case of *Robertson v. Robertson* was wrongly decided, or, against the whole weight of judicial opinion, except that expressed in the case of *Pratt v. Bunnell*, that subsequent legislation has curtailed the wife's rights in a case of this kind. And, having regard to the fact that the latter case was rightly decided even if the grounds upon which the judgment was based are erroneous, we might well, upon the authority of the cases alone, allow this appeal.

But, altogether apart from the authority of the cases in our own Courts, can the order in question be supported on

Judgment.
Meredith, J.

principle? The learned Judge in Chambers bases it upon the reasons given by him in delivering the judgment of the Court in the case of *Pratt v. Bunnell*; and those reasons are that the law as established by the case of *Robertson v. Robertson* gave rise to certain anomalies. But the moment the conclusion is reached that the wife is in the position of a surety for the husband the supposed anomalies vanish even in the unusual and improbable cases put as practical illustrations in that judgment; unless, indeed, one is bold enough to say that all of the rights of a surety are anomalous. The whole thing hinges upon the question whether the wife is a surety for the husband in the transaction; if she be, what reason can be advanced for depriving her of the rights which, for instance, a tenant for life would have if he had joined with the remainderman in a mortgage of the fee in lands to secure a debt of the latter?

"It is a well established general rule, that wherever a person mortgages his estates to secure the debt of another, the mortgagor stands in the relation of surety towards the debtor, whom he can call upon to exonerate his estate; and that whenever husband and wife mortgage the estate of inheritance of the wife for the benefit of the husband, her estate being considered only as a surety for the debt, she will, as any other surety, be entitled to exoneration, and after the death of the husband, the wife or her heir will be entitled to have it exonerated out of the real and personal estate of the husband. Even a creditor of the wife's, upon the refusal of her representatives to take proceedings, may commence an action to obtain exoneration." The cases on the subject are collected, and the rule thus stated in the notes to the case of *Earl of Huntingdon v. Countess of Huntingdon*, in White & Tudor's Leading Cases, 6th ed., vol. 2, pp. 1147, 1152. And the rule is thus concisely stated by Lord Justice Cotton in the beginning of his judgment in the case of *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218, at page 228: "No doubt it is true as a general rule that where a wife mortgages her property for her husband's debt she is considered as parting with it solely for the purpose of the mortgage."

The general rule is not open to question : the one question is, does the wife come within it now under her enlarged rights respecting dower in this Province ?

Judgment.

Meredith, J.

In the case of *Dawson v. Bank of Whitehaven*, it was decided by a Court of Appeal in England, that as against a second mortgagee of lands twice mortgaged by the husband, in the first of which only the wife had joined to bar dower, the wife had no right to the surplus moneys of a sale under the first mortgage, the whole being insufficient to satisfy both mortgages. That was the decision in that case, and the judgments in it shew the danger of giving effect to what may seem to be decided in any case without carefully applying the language used to the facts of it. In *Robertson v. Robertson*, that case was distinguished and held to be inapplicable, because, according to the law under which it was decided, there was no dower in any equitable estate as there was, under the statute, in the *Robertson Case*. And in the case of *Meek v. Chamberlain*, 8 Q. B. D. 31, Lopes, J., said : " It is not the case that the Court of Chancery does not give effect to the widow's right to dower. It is true that equity did not before the Dower Act acknowledge the right to dower out of a merely equitable estate. That is the explanation of the case of *Dawson v. Bank of Whitehaven*."

But whatever one might have thought of the effect of the judgment in that case, all questions seem to me to be set at rest by the legislation here on the subject of dower since the decision of *Robertson v. Robertson*. Under that legislation (42 Vict. ch. 22, sec. 1 (O.), now R. S. O. ch. 133, sec. 5), " No bar of dower contained in any mortgage or other instrument intended to have the effect of a mortgage, or other security upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee." If this enactment was framed with the very object of doing away with the effect of the judgment in *Dawson v. Bank of Whitehaven*, it would certainly be aptly framed, for the judgment in that case was based

Judgment. upon the view that the dower had been "extinguished,"
Meredith, J. "destroyed," and had "gone" at law under the release contained in the mortgage, and it was not a case in which there could be any dower in equity, being prior to the Dower Act. This provision of the Act is very much like an amplification of the words of Lord Justice Cotton, which I have quoted.

Now, by statute, the inchoate right of dower (as it is now generally termed) of the wife continues in her, notwithstanding the bar of it contained in the mortgage, unimpaired, except in favour of the mortgagee, and as to him "gone" only to such extent as may be necessary to give full effect to his rights under the mortgage.

As to the sixth section of the Act, it would be enough to adopt the view of Ferguson, J., expressed in the case *Re Hague, Traders Bank v. Murray*, 14 O. R., at p. 666, in these words: "Whatever may be the full meaning of the section, it seems clear to me that it cannot be held to have the effect of making the rights of a doweress less than they were held to be in *Re Robertson, Robertson v. Robertson*, in such a case as that one was." But I may add that my interpretation of it is that it is a statutable declaration that the conversion of the land into money shall not prejudicially affect the wife's right, whatever that right may have been, in the lands; that it does not give her a right to any part of the moneys arising from the sale in a case where she would not have been entitled to dower in the lands, for instance, if the lands had been mortgaged for her debt, more in amount than the value of her right in the land; nor does it deprive her of any right which, as surety for the debt of her husband or otherwise, she would have, but such rights are to be satisfied out of the purchase moneys, altogether if enough, *pro tanto* if not.

And why should not the wife, in respect of her rights as to dower, be in as favourable a position as any other person having any interest in property? Why should her rights be sacrificed even to her husband's creditors? What possible right can they have to take from her, and possibly from

her creditors, that which is often in this country a scanty Judgment.
share of property gained largely by her lifetime efforts? Meredith, J.

I have no doubt that we should allow this appeal, and discharge the order in question, and that, of the surplus moneys in question, a sufficient sum should be retained in Court to satisfy the wife's dower in the whole of the lands in question, in the event of her surviving the respondent, her husband. She should have her costs of this appeal.

A. H. F. L.

[CHANCERY DIVISION.]

GREEN V. THE TORONTO RAILWAY COMPANY.

Negligence—Street Railway Company—Right of Way—Duty to Sound the Gong.

A car of the defendants' electric street railway was moving very quickly along a down grade on a street in a city where the plaintiff, who was in the employment of the city corporation, was engaged in his duty of sweeping the road-bed. The motorman did not sound the gong on the car, as was customary, and ran into the plaintiff, injuring him:—

Held, that although the defendants had the right of way, the omission to sound the gong or give any warning of the approach of the car was actionable negligence.

THIS was an action for negligence brought by the plain- Statement.
tiff, Empson Green, against the defendants. As stated in the pleadings, the plaintiff was, on August 7th, 1894, working as an employee of the cleaning department of the city of Toronto, under the subway in Queen street west, when he was run into and thrown with violence against the wall of the subway by a motor-car of the defendants, wherefrom he sustained the injuries complained of.

The action was tried at the Autumn Assizes, 1894, at Toronto before FALCONBRIDGE, J., and a jury, and resulted in a verdict and judgment for the plaintiff for \$450, the jury finding that the plaintiff's injuries resulted from the

Statement. negligence of the defendants in not sounding the gong according to custom, and that there had been no contributory negligence on the part of the plaintiff.

The defendants now moved before the Chancery Divisional Court by way of appeal from the above judgment on the grounds, among others, that there was no sufficient evidence of negligence on the part of the defendants, and that if the gong was not sounded or other warning of approach given, no liability attached to the defendants, because it was not their duty to keep the gong on the cars, or to keep such gong constantly sounding, which would be in fact a nuisance.

The motion was argued on December 18th, 1894, before ROBERTSON and MEREDITH, JJ.

Bicknell, for the defendants.

Smyth, for the plaintiff.

February 21st, 1895. ROBERTSON, J. :—

The jury found that the servants of the defendants were guilty of negligence in that they did not sound the gong "according to recognized custom"; that there was no contributory negligence, and that the plaintiff could not by the exercise of reasonable diligence have avoided the accident. The evidence established beyond doubt that a gong is affixed to the front part of every motor-car, under the control of the motorman, to be used by him in giving warning to whoever is in the road as the car is approaching, and that it is the duty of the motorman to sound the gong, on such occasions, and that if he sees a person on the track he neglects or disregards his duty if he does not sound his gong, on the car approaching such person, etc. The jury found in most emphatic language that there was no negligence on the part of the plaintiff.

The accident happened in early morning, of August 7th, 1894, while the plaintiff was engaged sweeping the road-bed, under the direction of the street commissioner for

the city of Toronto, in the Queen street subway. The car Judgment.
was running very quickly at the time, being on the down Robertson, J.
grade, without the aid of the electric power, over a track
which had been sprinkled with water a few moments
before. The defendants rely on the fact that they have by
legislative sanction the right of way, and that there is no
statutory obligation on their part to sound the gong, and
that it was the duty of the plaintiff to look out and
keep out of the way of the approaching car. The case
was very fully argued, on this basis, before the learned
trial Judge and the jury, who found, as before stated, all
the facts in favour of the plaintiff, and assessed the
damages at \$450.

While it is conceded that the defendants must of necessity have the right of way, it is contended *per contra*, that that does not excuse them for running down whoever may be on the track in front of the motor-car. The question is of grave importance, and, in my judgment, it behoves the Courts to be extremely cautious in declaring the rights of the street railway companies, on the one hand, as against the public on the other. Electric street railways are of incalculable benefit to the community at large; the franchise granted them by the municipality in which they operate, on the other hand, is of immense value; in fact the advantages are mutual; and while the company has the undisputed right of way, that does not extend to the right of running at a speed along the thoroughfares of the city at such a rate that the motormen have not got full control of their car. No matter at what speed they may choose to run, they have no right to run at such a rate as to endanger human life or property. The circumstances are not the same as those under which an ordinary steam railway is run through the country parts; there the roadway belongs to the company, and whoever goes thereon is a trespasser, except in certain cases, such as crossings, station grounds, etc. On the street railway the public have the right to the use and enjoyment of the street, subject to the franchise granted to the company, and are in no sense

Judgment. trespassers, so that whoever may find it necessary or convenient to do so has the right to use the streets of every city, town or village in the country, and for that reason the railway company must not be guilty of negligence in its user. It might as well be said in regard to the ordinary rule of the road, that because that rule entitles anyone who is driving thereon to the right hand side, that he by reason of that rule would be excused if he wantonly drove his vehicle or horse into the vehicle or horse of another who happened to be travelling in the opposite direction on the wrong side of the road.

I think the plaintiff, under the circumstances in which he was placed, had a reasonable right to expect that the motorman, seeing him, as he must have seen him, in close proximity to the rail earnestly engaged in the performance of his work, would sound the gong, not only in accordance with the recognized custom, but in obedience to his duty, and especially so, as he, the motorman, knew the car was slipping quietly along unperceived by the plaintiff. Whether it was a statutory duty or not, is not the question; it was clearly his duty to do something to arouse the man instead of running him down in the wanton way which he seems to have done. I do not think *Moran v. Hamilton Street R. W. Co.*,* relied upon by defendants applies. There the plaintiff stepped in front of the approaching car as it was approaching, and it was impossible for the motorman to avoid the accident. Moran was standing on what is called the "devil's strip" immediately before the car came up to the spot where he was, and had he stood still he would not have been struck. Here the

*Action tried at Hamilton on January 11th, 1894, before MacMahon, J., who gave judgment on January 31st, 1894, nonsuited the plaintiff, holding that the plaintiff was the cause of his own injuries, which, so far as the defendants were concerned, was the result of a pure accident. There was evidence that the gong had not been sounded and that no warning had been given. This was affirmed by the Common Pleas Divisional Court on June 12th, 1894, but was afterwards, on March 29th, 1895, set aside by the Court of Appeal, who stated they had come to the conclusion that there was some evidence of negligence to submit to the jury, and ordered a new trial.

plaintiff was off the track on the north side of the rail, Judgment. but in such dangerous proximity that the motorman must Robertson, J. have known unless he stepped out of the way what the inevitable consequences would be. A sound of the gong would have aroused the plaintiff, and one step to the north would have saved him. The motorman, I dare say, took for granted he would take that step, supposing, as he most likely did, that the plaintiff saw the car approaching, but he took the chances without the reasonable precaution referred to, and the accident took place. In my judgment the finding of the jury was correct, and so long as this company will keep reckless motormen and conductors in their service, it may conclude that when juries get the chance they will visit the consequences of that recklessness on the heads of those who alone are responsible to the public.

The damages are reasonable, and I can see no reason for interfering with the verdict. I think the motion should be dismissed with costs.

MEREDITH, J. :—

We would not have taken time to consider this case, nor, indeed, have heard counsel in support of the judgment, but for the recent judgment of the Common Pleas Divisional Court in the case of *Moran v. Hamilton Street R. W. Co.*, not yet reported, which, it was said, was a clear authority for the defendants.* That being a judgment of this Court, though of another Divisional Court, we ought to follow it, whatever our views of the question there decided might otherwise have been, leaving it to the Court of Appeal to set it right if that Divisional Court erred in its view of the law applicable to the facts of that case.

But for what was said of that case I would not have doubted that there was reasonable evidence of negligence on the part of the defendants, and that the question of contributory negligence was, upon the whole evidence, one for the jury also.

* See *supra* p. 322 note.

Judgment. I cannot doubt that a jury might rightly find that not sounding the gong or giving any warning to the plaintiff, who was in a place of danger, of the approach of the car, was actionable negligence on the part of the defendants. Indeed, it was a matter of surprise to me that it could be seriously urged that the defendants owed no such duty, no duty to a person in danger of being run down because his place of danger did not happen to be at a street crossing; for I would have thought it a most obvious duty of every driver upon a public highway, and essentially so of a driver of a car, the ordinary speed of which must make it a more than ordinarily dangerous vehicle; a duty not only to the person in danger of being run down, but also to the occupants of the car who may be put in some danger by any and every collision. The street cars have the right of way, but having it, is it too much to say that they should give warning, when it is, or is likely to be, impeded, of their intention to exercise it. It is true, that knowing of the danger in crossing the tracks of these railways, persons crossing should take more than the ordinary care required in crossing where only ordinary vehicles are in use; but there is the corresponding and, indeed, the earlier need for the use of more than ordinary care on the part of the owners and drivers of vehicles of very much more than ordinary danger, when using the public highways for their own profit more than mere public convenience. And it is a matter of some satisfaction to find that the defendants' superintendent takes a very different view of the defendants' duties in this respect from that urged in the defendants' behalf before us. In his testimony at the trial he said that car-gongs were for the purpose of giving warning "to whoever is in the road"; and that it is the duty of the driver to sound the gong "when he sees anything on the track," and that "if he sees a person on the track it is his duty to ring the gong," and that if he failed to do so, he would be neglecting his duty. Having regard to those statements, I cannot but think his appreciation of the legal duty of the defendants in the matter

in hand was of a much fairer and more accurate character than that of the defendants, if judged by the contentions made in their behalf before us. The plaintiff was, and I think we may be as far as this case is concerned, content to leave the matter just where the defendants' superintendent put it. Judgment.
Meredith, J.

No excuse was offered for not giving warning; if the driver had any excuse to offer he ought to have been called as a witness for the defence; the jury might, not unfairly, infer a good deal from the fact that he was not called to give his account of the accident, to state why he gave no warning to a man who, according to the testimony given at the trial, was rightly employed in sweeping the street and was, when the car approached, unaware that the cars had commenced running that morning, the hour being early, and properly performing his work and naturally looking down at it; in these circumstances, if true, one would be glad to hear what explanation could be given for bearing down upon, and running against, the man, without giving any warning whatever; if not true, it was quite as much the duty of the defendants to give the jury the benefit of the driver's testimony, if they wished to avoid unfavourable inferences. The jury, no doubt, credited entirely the plaintiff's account of the transaction, and upon it found that he was not guilty of contributory negligence; and, if so, to say the least of it, there was some reasonable evidence in support of their verdict; and so the learned trial Judge could not have withdrawn the case from them: see *The Directors, etc., of the Dublin, Wicklow & Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1158, and *Morrow v. Canadian Pacific R. W. Co.*, 21 A. R. 149.

But does the case of *Moran v. Hamilton Street R. W. Co.*,* before referred to, compel us to give effect to the defendants' contention? While prepared to give effect to the decision in that case, so long as it stands, I am not prepared to apply it to any cases in which the facts are not substantially the same; and that they are not in this case.

*See *supra* p. 322, note.

Judgment. That was a case of master and servant, the servant
Meredith, J. being engaged in the work of straightening the tracks of
the company upon which the cars ran. Here the plaintiff
was a stranger to the defendants. That was a case in
which it appears that the plaintiff, being in a position of
safety, suddenly stepped into danger, so that there may
have appeared to have been no need to warn him until it
was too late to do so effectually. Whatever else may be
said of that case, these facts, to my mind, sufficiently dis-
tinguish this case from it for us to uphold the view of the
trial Judge, given effect to in his considered judgment, that
he was not prevented by that case from giving effect to
the jury's very clear findings entirely in favour of the
plaintiff.

The motion should, therefore, in my opinion, be dismissed
with costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE BRIDGEWATER CHEESE FACTORY COMPANY V.
MURPHY.

Company—Promissory Note—Banks and Banking—Discount—Account in Name of President—Misappropriation of Funds—Application of Discount to Company's Benefit.

One S., president and treasurer of a cheese company, kept an account with the defendants, private bankers, on behalf of the company, headed "S., president of B. Cheese Company," upon which he drew from time to time by cheques signed "S., president." The account being overdrawn, the defendants, in good faith, at the request of S., discounted a note in their own favour signed "S., president," with the seal of the company attached (but made without the knowledge or authority of the directors, by whom with the president under the by-laws of the company its affairs were to be managed), and placed the proceeds to the credit of the account, which were afterwards chequed out by S. to pay creditors of the company. At this time S. was a defaulter to the company to a larger amount than the note. In the meanwhile after two renewals the note was charged up by the defendants to the account, with the consent of S. but without the authority of the directors who were unaware that S. was a defaulter, but knew that he kept the bank account in his own name as president depositing therein the proceeds of sales of cheese and drawing upon it to pay the company's creditors. The company now sued to recover the amount of the note from the defendants, who did not plead fraud, but alleged they had fully accounted :—

Held, that the plaintiffs were bound to affirm or disaffirm the transaction altogether and could not repudiate the liability upon the note and at the same time take the benefit of it.

Decision of STREET, J., reversed.

THIS was an action brought for the recovery of money Statement.
under circumstances which are set out at length in the following statement of facts taken from the judgment of STREET, J., before whom it was tried :—

The plaintiffs are a company incorporated under the Ontario Statute, 51 Vict. ch. 24.

Their by-laws produced enact that the affairs of the company shall be managed by the president and a board of four directors. One Sexsmith was appointed president, and he also acted as treasurer of the company, and kept an account with the defendants, who are private bankers, headed in their books: "E. Sexsmith, President, Bridgewater Cheese Factory," upon which he was in the habit of issuing cheques signed "E. Sexsmith, president." On December 12th, 1892, this account was overdrawn to the

Statement. amount of \$57.82, and on that day Sexsmith made a note for \$1,600 in favour of the defendants, which he signed, "E. Sexsmith, president," and to which he attached the seal of the company. This note the defendants discounted, placing the proceeds to the credit of the account. Of the proceeds of this discount, \$1,343.76 was paid out by cheques drawn on the account by Sexsmith to various persons who were creditors of the company, and the balance went to cover overdrawn account with the defendants and another similar bank account. At the time it was discounted, and at the time these moneys were paid out, Sexsmith was a defaulter to the company in an amount much exceeding the amount of the note. The note was made without the knowledge or authority of the directors of the company, who were also unaware of the fact that Sexsmith was a defaulter; but they were aware of the fact that this bank account was kept by Sexsmith in his own name as president, and that he issued cheques upon it in his own name as president. The deposits in this account were solely of moneys derived by Sexsmith from the sale of the company's cheese; and the cheques upon it were solely in payment of claims against the company, and these facts were known to the defendants. The \$1,600 note was renewed, and was then again renewed for \$1,611, and was on June 19th, 1893, charged up by the defendants to the bank account above mentioned at its maturity without any authority from the directors of the company. Sexsmith absconded about December 6th, 1893. The effect of charging the note to the bank account on June 19th, 1893, was to overdraw it to the extent of \$1,200.99; but this overdraft was covered and converted into a credit balance by two deposits made in July of money received by Sexsmith during that month from sales of cheese. This was afterwards converted into a debit balance or overdrawn account of \$110.94 by cheques drawn by Sexsmith on the account for payments made on behalf of the company. This overdrawn account was balanced on September 18th, 1893, by a deposit of \$110.94 to the

credit of the account. This is the last entry with the exception of a small debit and credit of \$8.10. At the time Sexsmith absconded, he was a defaulter to the company. At the time the note of \$1,611 was charged to the bank account on June 19th, 1893, he had received in all from first to last for sales of cheese, \$12,230.80, according to the Master's report, and had paid out \$12,199.04, so that he owed the company only \$31.76. Statement.

The present action was brought by the plaintiffs to recover from the defendants the \$1,611, which would have been at the credit of the bank account, had the \$1,611 note not been charged. It was contended that Sexsmith had no power to bind the company by making a note in its name, even though he signed it as president and affixed the corporate seal to it.

At the conclusion of the evidence at the trial at Belleville, on March 7th and 8th, 1894, the learned Judge held that the only claim the defendants could have against the plaintiffs, was for such portion, if any, of the proceeds of the \$1,600 note as were applied for the benefit of the plaintiffs—not determining then whether the plaintiffs would be liable to pay it, if Sexsmith merely replaced moneys which he had misappropriated, by the proceeds of this note; and a reference was directed to Mr. A. G. Northrup to ascertain the state of account between Sexsmith and the company at the time the \$1,600 note was discounted, and at the time it was charged to the plaintiffs' account; and also to ascertain whether any, and if so, what debts or liabilities of the plaintiffs were, in fact, paid out of the proceeds of the \$1,600 discount, or what portion, if any, of such proceeds were applied to the benefit of the plaintiffs.

The Master reported that all the proceeds of the note went to the plaintiffs' account in the bank, and was applied to pay liabilities of the plaintiffs, so that they got the whole benefit of it.

Argument. Upon October 18th, 1894, at Toronto, the plaintiffs moved for judgment for the amount claimed, upon the above judgment, and the Master's report.

Porter, for the plaintiffs.

Masson, for the defendants, referred to *Molsons' Bank v. The Corporation of the Town of Brockville*, 31 C. P. 174; *Scott v. The Bank of British North America*, 28 S. C. R. 277; *Scott v. The Bank of New Brunswick*, L. R. 5 P. C. 277; *Ex p. Shoolbred*, 28 W. R. 339; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Swire v. Francis*, 3 App. Cas. 106; *Finn v. Dominion Savings and Investment Society*, 6 A. R. 20; *Gibbons v. Wilson*, 17 O. R. 290, 17 A. R. 1; *Smith v. The Hull Glass Co.*, 8 C. B. 668; *S. C.* in App. 11 C. B. 897; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259.

Porter, in reply. The money was received on the individual note of Sexsmith as a matter of law, and the bank cannot recover it: *Daniel on Negotiable Instruments*, 4th ed., pp. 355-6, 363, 369; *The Gore Bank v. The Municipal Council of the County of Middlesex*, 16 U. C. R. 595; *Clench v. Consolidated Bank of Canada*, 31 C. P. 169; *Gray v. Johnston*, L. R. 3 H. L. 1, 14; *Currier v. Ottawa Gas Co.*, 18 C. P. 202; *Brown v. Howland*, 9 O. R. 48, 63, 15 A. R. 750; *Smith's L. C.*, 6th ed., vol. 2, p. 344; *Gilbert v. McAnnany*, 28 U. C. R. 384; *Hagarty v. Squier*, 42 U. C. R. 165; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Madden v. Cox*, 5 A. R. 473; *The Planters and Mechanics' Bank of Dalton v. Irwin*, 31 Ga. 371, 377; *Royal British Bank v. Turquand*, 6 E. & B. 327.

November 14th, 1894. STREET, J.:—[After setting out the facts as above.]

The action was tried before me at the Belleville Spring Assizes, on March 7th and 8th, 1894, without a jury. I held that Sexsmith had no power to make a note on behalf of the company, but reserved judgment upon the whole case until

the accounts should be taken by the Master. This having been done, with the result above mentioned, the matter was argued before me on 18th October, 1894, and judgment was reserved.

Judgment.

Street, J.

Although I thought at the trial that no express authority to charge the \$1,611 note to the bank account had been shewn to have been given by Sexsmith to the defendants; yet I think it must be taken to be proved by the other circumstances of the case that he was aware of the fact that it had in fact been charged to the account, and that he assented to it; for we find him in September, 1893, three months after the charge had been made, depositing a sum of \$110.94 to the account manifestly for the purpose of covering an overdraft, which would not have occurred but for that charge.

I think further that it must be taken to have been established on the part of the defendants that they discounted the note in question in perfect good faith, believing that it was for the company's purposes, and authorized by the company; and that they remained under this belief until long after they had with his consent charged the note to the account in their bank. It is also undisputed that the directors of the company were aware that Sexsmith kept this account in the defendants' bank; that he deposited their moneys to the credit of it, and that he drew cheques upon it for the needs of the company in his own name as president. The defendants also knew that the account was not the private or individual account of Sexsmith, but that it was an account kept for the company in which their moneys were intended to be deposited without any mixture of private moneys.

Sexsmith then without the knowledge of the plaintiffs and without authority from them, borrowed money from the defendants and deposited it to the credit of the plaintiffs' account in the bank, and paid liabilities of theirs to the extent of between \$1,300 and \$1,400 out of this borrowed money. He should, at that time, have had, but he had not in fact, moneys of the plaintiffs in his hands with

Judgment.

Street, J.

which to pay these liabilities; and the money which he borrowed from the defendants, was, therefore, in reality borrowed by him to make good his defalcations. When the note upon which he borrowed the money finally matured, it was charged with his consent to the bank account, to the credit of which the borrowed money had gone, and was, in fact, paid by him out of other moneys of the plaintiffs, which had in the meantime come to his hands from sales of cheese and been deposited to the credit of the same account. The plaintiffs sue for the balance which would appear at credit of the account, had this note not been charged; the defendants, without in any form, alleging that any fraud has been practised upon them, simply answer that they have accounted for and paid over to the plaintiffs all money that has come to their hands.

Upon the facts and pleadings, I am of opinion that the defendants have shewn no right to charge the plaintiffs with the amount of this note. As a matter of law, the note was not the note of the plaintiffs, but was the individual note of Sexsmith; as a matter of fact, the account to which the note was charged, was a trust account, the moneys at the credit of which belonged to the plaintiffs and not to Sexsmith and the defendants knew this. They could not without assenting to a breach of trust on his part, permit Sexsmith to pay to them his private debt out of trust funds which they knew to be such: *Bodenham v. Hoskyns*, 3 DeG. M. & G. 903; *Ex p. Kingston*, L. R. 6 Ch. 632; *Gray v. Johnston*, L. R. 3 H. L. 1.

Had fraud on the part of Sexsmith been alleged in the pleadings of the defendants, and proved on their evidence, it is possible that other principles must have been considered. But fraud is a matter which must be alleged if it is relied on, and should not be found unless the intention to rely on it appears upon the pleadings: *Davy v. Garrett*, 7 Ch. D. 473, 489; *Wallingford v. Mutual Society*, 5 App. Cas. 685, 697; Kerr on Fraud, 2nd ed., pp. 425, 426.

For these reasons I think the plaintiffs are entitled to recover the \$1,611 charged to their account by the defen-

dants on June 19th, 1893, with interest from, say August 1st, 1893, when the plaintiffs' moneys had covered the overdraft caused by charging the note; the plaintiffs are also entitled to their costs.

Judgment.

Street, J.

The defendants moved against the above judgment before the Divisional Court, consisting of ROBERTSON and MEREDITH, JJ., on December 14th, 1894.

C. Moss, Q. C., Masson, and D. E. K. Stewart for the defendants. The money should be repaid to us, having gone to the company's credit, and they having got the benefit of it. No objection was taken till after Sexsmith absconded in December. The company had authority to borrow money, and as incidental thereto to make notes, being a trading company: *General Auction, Estate, and Monetary Co. v. Smith*, [1891] 3 Ch. 432; *Leeming v. Albert Cheese Co.*, 31 C. P. 272. Capacity to incur liability is co-extensive with capacity to contract: 53 Vict. ch. 33 (D); sec. 22. Section 90 of that Act provides for the corporation seal being sufficient: see, also, *Agar v. The Athenæum Life Assurance Society*, 3 C. B. N. S. 725; *Royal British Bank v. Turquand*, 6 E. & B. 327. The company cannot derive a benefit from the fraud of its own agent. Sexsmith had complete control of the account: *Clench v. Consolidated Bank of Canada*, 31 C. P. 169; *Gray v. Johnston*, L. R. 3 H. L. 1, especially at pp. 13-15; Grant on Banking, 4th ed., 147, 149; *Keane v. Robarts*, 4 Madd. 332, at p. 357; *MacKay v. Commercial Bank of New Brunswick*, L. R. 5 C. P. 394; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Swire v. Francis*, 3 App. Cas. 106; *Oakes v. Turquand*, L. R. 2 H. L. 325. The point as to the pleading is not well founded. There should be an adjudication on the real rights of the parties. If there were any doubt as to the whole sum, there can be no doubt as to the portion traced as gone for the company's purposes: *Blackburn Building Society v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61,

Argument. 9 App. Cas. 857, discussed in *General Auction, Estate, and Monetary Co. v. Smith*, [1891] 3 Ch. 432, already cited; *Re The Japanese Curtains and Patent Fabric Co. (Limited)*, *Ex parte Shoolbred*, 28 W. R. 339; *Walmsley v. Rent Guarantee Co.*, 29 Gr. 484.

Masson on same side, cited *Molsons Bank v. The Corporation of the Town of Brockville*, 31 C. P. 174; Lindley on Companies, pp. 169, 174.

B. B. Osler, Q. C., for the plaintiffs. Cheese associations are not now trading corporations. Their function is simply gathering the milk, converting it into cheese, and distributing the proceeds after deducting expenses. There is no necessity to make promissory notes. The necessity of making the note arose from the fact that Sexsmith had embezzled. It was to enable Sexsmith to pay his defalcations. It did not purport to be the note of the company, and the seal does not make it what in its body it does not purport to be. When it fell due it was not charged up to the company. Without any authority from any body—though confirmed by Sexsmith—the note was afterwards charged up to our account. Could they at that moment have sued us on the note? See *The Gore Bank v. The Municipal Council of the County of Middlesex*, 16 U. C. R. 595. We did not know of the note; if we had we would have been put on enquiry, and probably would have saved everybody from loss. The plaintiffs were bound to know the corporate powers, and the way in which the corporation could be bound, and there was no power in the president whether with or without the seal to bind the company upon a promissory note: *Madden v. Cox*, 5 A. R. 473; Daniel on Negotiable Instruments, 4th ed., sec. 387. If the note were out there would be \$1,600 to our credit. As to the right of such a company to give a note: see *ib.* secs. 378, 380, and at p. 363. The fact that the proceeds go to the company will not make the note other than a personal liability: *ib.* secs. 410 *et seq.* Nor will the seal: *Dutton v. Marsh*, L. R. 6 Q. B. 361.

[MEREDITH, J.—But cannot the proceeds be followed?]

If we had with knowledge got the proceeds it would have been different. There was no neglect on our part. Could Sexsmith get the advance, and then charge it up to another account? Argument.

Guss Porter, on the same side. The fact that the note was payable to Sexsmith's own order was enough to put them on enquiry: *McCullough v. Moss*, 5 Denio 575; *Daniel on Negotiable Instruments*, 4th ed., p. 402. As to the defendants having taken the note *bonâ fide*, believing it to be the note of the plaintiffs: *Planters and Mechanics' Bank of Dalton v. Erwin*, 31 Ga. 371, 377; *Smith v. Immigration Co.*, 78 Cal. 289.

W. Cross, also on the same side.

Moss, in reply. There was the fullest recognition of Sexsmith as the active manager of the company. The defendants were not bound, and could not be bound to enquire into the purpose for which Sexsmith was drawing out the moneys. If the account is Sexsmith's account we had a right to deal with that account, and the plaintiffs cannot object. If it was the company's account, and the money was not advanced to and for the company, then our answer is, very well, its a mistake, and we'll withdraw the whole thing from your account. It was our money, placed in the account to their credit, and we have a right either to obtain the benefit of it, or to withdraw it altogether: see, also, *Brockville and Ottawa R. W. Co. v. Canada Central R. W. Co.* 41 U. C. R. 431; *Straton v. Rastall*, 2 T. R. 366; *Young v. Cole*, 3 Bing. N. C. 724.

February 21st, 1895. MEREDITH, J.:—

There is much to be said in favour of the contention that the plaintiffs would be liable upon the promissory notes in question, but I do not think we need consider that question, for it seems to be very plain that the plaintiffs are blowing hot and cold, seeking to adopt that which is for their benefit, and to reject the rest; and that they cannot do; they must affirm or disaffirm the transaction

Judgment. altogether: see *Smith v. The Hull Yarn Co.*, 11 C. B. 897 ;
Meredith, J. *Leeming v. Albert Cheese Co.*, 31 C. P. 472 ; R. S. O.
ch. 1, sec. 8, sub-sec. 25 ; *General Auction, etc. v. Smith*,
[1891] 3 Ch. 432, and *Sheppard v. Bonanza Nickel Mining
Company of Sudbury*, 25 O. R. 305.

Upon the facts as found it seems to me necessary only to state the case to shew that they cannot recover, unless by some legal fiction we are prevented doing justice between the parties.

The facts are that the president of the company opened a bank account for the plaintiffs with the defendants ; that was in reality, whatever it may have been in law, the plaintiffs' account ; if not, they fail, for the action is to recover the balance of that account. The president of the company, acting for the company, and in the name and upon the credit of the company, discounted the note in question as the company's note, and had the proceeds of the note placed to their credit in that account. That note was, as is very usual, renewed more than once, and finally charged up in the usual and proper course of business to that account. Now, the plaintiffs are suing for the balance of that account ; and admittedly there is no balance, unless they can repudiate liability upon the note, and at the same time take the benefit of it. Surely, when they say you cannot charge us with that note because it was *ultra vires* of the company to make a promissory note, or beyond the authority of our president to negotiate it—though, by the way, he was permitted, as a matter of fact, to take almost absolute control of the company's business for the company—it is quite open to the defendants to say, very well, then, we strike it out of your account altogether, the credit as well as the debit. It is not as if the defendants were suing the plaintiffs upon that note, whatever might have been the result of that action having regard to the fact that practically the whole of the proceeds of it are traced into proper payment for the company, and most, if not all, into payment to the members of the corporation who are seeking now to recover a sum which in honesty and fair dealing

they are not entitled to. It is a simple case of a person seeking to take the benefit without assuming the burden of a single transaction. The onus is upon the plaintiffs to shew that they were entitled to be credited with the sum in question, and that the defendants are accountable to them for it. The credit of the sum in their account—if they do not repudiate the account—might alone be enough *prima facie* proof; but in proving that the whole facts come out, and they are placed in a position where they must affirm or disaffirm the transaction; if they affirm, they are right in charging the defendants as they have done, but are bound to credit them with the note when it eventually comes home to them; if they disaffirm the transaction, then they prove that they are not, and never were, entitled to the sum in question; and so in either case their action fails, and should have been dismissed; unless, indeed, they can shew, as eventually upon the argument before us they sought to, that the loan was in reality one to the president of the company individually, and the proceeds deposited by him to the company's credit as a payment to them, which it was urged was likely, as he is supposed to have been a defaulter in respect of the company's funds at the time; but the finding of the learned trial Judge is entirely, and rightly so, against any such contention; if it had been otherwise there might have been cause for finding fault with it.

The ground upon which the learned trial Judge decided the case in the plaintiff's favour appears to be this: that the making of a promissory note was *ultra vires* the company—for otherwise there would appear to be quite enough in evidence to estop them from setting up mere want of authority in the president to negotiate it as he did—and being *ultra vires*, could not in law have been, however plainly in fact it may have been intended to be, the company's note, and therefore it must be taken to be the personal note of the president, the proceeds his property, and such proceeds being placed to the credit of the company, could be retained by them to answer his debt to them. If the plaintiffs were

Judgment. suing the president individually, and the act were *ultra*
Meredith, J. *vires*, no doubt he would be liable, and could not at law give
parol evidence to shew that he was not the party intended
to be charged. The familiar case of the churchwardens,
Furnivale v. Coombes, 5 M. & G. 736, is a strong illustration
of that principle. The liability in such cases seems now,
however, to be put on the ground of false representa-
tion of authority: *West London Commercial v. Kitson*, 13
Q. B. D. 360. But surely a plaintiff is not so bound, he
can shew the real transaction just as he may shew an
undisclosed agency, though the agent cannot: see *Calder*
v. Dobell, L. R. 6 C. P. 486. Indeed, in some cases the de-
fendant may shew that the apparent is not the real trans-
action so as to relieve himself: see *Wake v. Harrop*, 6
H. & N. 768, and 1 H. & C. 202. The plaintiffs are, if the
transaction were *ultra vires*, no parties to it; the defen-
dants are not suing upon it, or setting it up in defence;
how then can the plaintiffs hold the defendants to that
which the defendants might, if they chose claim to be its
legal effect, contrary to the reality of the thing, and con-
trary to what the instrument purports to be, and what the
parties to it maintain the transaction was?

The motion must be allowed, and the action dismissed
with costs.

ROBERTSON, J., concurred.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. PLOWS.

Justice of the Peace—Provincial Fisheries—Jurisdiction—Prosecution for Penalty Exceeding \$30—55 Vict. ch. 10 (O.), secs. 19, 25, 26.

The defendant was convicted before one justice of the peace on an information under 55 Vict. ch. 10, sec. 19 (O.), charging him with fishing in a certain stream without the permission of the proprietors, and of taking therefrom forty-five fish :—

Held, that the conviction must be quashed, for the penalty fixed for the offence charged exceeded \$30, and, therefore, under sections 25 and 26 of the Act, the prosecution should have been before a stipendiary or police magistrate or two or more justices of the peace, or one justice and a fishery overseer.

Only one offence is created by section 19, that of fishing in prohibited waters, and that offence is complete though no fish be taken.

THIS was a motion to quash a conviction, under the circumstances mentioned in the judgment, argued before MEREDITH, C. J., and ROSE, J., on February 6th, 1895. Statement.

Aylesworth, Q. C., for the motion. The defendant admitted fishing, but not catching fish. The penalty is too great. The statute does not apply to a stream which does not flow over Crown lands wholly or in part: 55 Vict. ch. 10 (O.), sec. 2.

Du Vernet, for the Crown. There are two penalties. The first is for fishing in private waters. The defendant pleaded guilty of this. The question then arose whether the magistrate was not entitled to go on and deal with the second penalty and second offence, and charge \$1 for each fish caught. R. S. C. ch. 168, sec. 59, as to malicious injury is analogous. *Regina v. Flynn*, 20 O. R. 638, shews how far the Court will go in sustaining convictions. The information disclosed two offences, as in *Regina v. Hazen*, 20 A. R. 633, and one can be rejected. It is like an information for keeping liquors for sale and for selling, and the magistrate without evidence of selling, convicts for keeping. The Court upheld that in the *Hazen Case*.

Aylesworth, in reply. The distinction between this and

Argument. the *Hazen Case* is that there were two offences, over both of which the magistrate had jurisdiction, but here over one of the offences a single magistrate had no jurisdiction. As to costs, I refer to *Regina v. Hollister*, 8 O. R. 750.

Du Vernet referred to secs. 83 and 89, Summary Convictions Act, R. S. C. ch. 178.

March 2nd, 1895. MEREDITH, C. J. :—

The defendant was convicted by Peter Anderson, one of the justices of the peace for the county of Bruce, on an information charging him: "For that he did unlawfully, without the permission of the proprietors, fish in a certain stream in the township of Amabel, in the said county of Bruce, known as Spring creek, being a stream leased by private parties, in which fish are lawfully cultivated, owned and maintained by the lessees of the said stream, and did take therefrom forty-five fish." (a)

The prosecution was under the provisions of 55 Vict. ch. 10 (O.), "An Act for the Protection of the Provincial Fisheries," for an infraction of section 19, which is as follows:

"19. Whoever, without permission of the proprietor, fishes in that portion of a pond, stream or other waters in which fish are lawfully cultivated, owned and maintained by a private owner or lessee, shall render himself liable to a fine of not less than \$5 and not more than \$20, and to a further penalty in each case of \$1 for each fish so taken."

The defendant now moves to quash the conviction on several grounds, the only one of which, in the view I take of it, it is necessary to consider is the fourth ground stated in the order *nisi*, which is that the Justice had no jurisdiction to hear or determine the charge, inasmuch as the punishments fixed by the statute for the offence as charged and tried by him exceeded \$30.

(a) The sentence was a fine of \$10 for fishing in Spring creek without permission, and a further penalty of \$20 on account of the fish taken out of the creek, and that in default of payment defendant should be sent to the common gaol with hard labour for sixty days.

This contention is based on the provisions of sections 25 and 26 of the Act. Section 26 provides that prosecutions for the punishment of any offender under the Act other than those mentioned in section 25 are to take place before a stipendiary or police magistrate or two or more justices of the peace, or before one justice and any fishery overseer; and section 25 enacts that "All prosecutions for the punishment of any offence under this Act, for which offence the penalty does not exceed the sum of \$30 and imprisonment, or imprisonment at hard labour in default of payment thereof and of the costs, may take place before any fishery overseer, stipendiary or police magistrate, or one or more of Her Majesty's justices of the peace having jurisdiction in the county or district in which the offence is committed."

Judgment.
Meredith,
C.J.

It is, I think, clear that but one offence is created or dealt with by section 19—that of fishing in prohibited waters without the permission of the proprietor—and that the offence is complete, though no fish be taken. The penalty in that case is a fine of not less than \$5 and not more than \$20, and the only effect of the taking of the fish is to make it necessary to impose an additional fine of \$1 for each fish taken.

The defendant in this case was, as I have pointed out, charged with fishing contrary to the provisions of section 19, and in so doing having taken forty-five fish. The penalty for the offence so charged was a fine or penalty of not less than \$50 and not more than \$65, and it is plain, therefore, that the prosecution was for the punishment of an offence, the penalty for which exceeds \$30 and imprisonment in default of payment of the fine or penalty and costs, and could not take place before one justice of the peace.

The convicting magistrate having had no jurisdiction to try the charge, the conviction cannot be supported, and must be quashed.

The case is not one in which costs should be awarded to the defendant. Though he has succeeded, it appears from

Judgment. the papers returned by the convicting justice, that when
Meredith, the defendant was brought before him, he admitted that
C.J. he was guilty of the offence charged except the taking of
the forty-five fish, and was, therefore, upon his own confession guilty of an offence against the provisions of section 19.

Three convictions have been returned by the justice in answer to the writ of *certiorari*, and as none of them can, in the view I have taken, be supported, they must all be quashed.

There will be the usual order for the protection of the justice.

ROSE, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

WEBB V. THE BARTON STONEY CREEK CONSOLIDATED
ROAD CO.

*Way—Road Companies—Negligence—“ Done in Pursuance of this Act ”—
Limitation of Actions—“ Within Six Months after the Fact Com-
mitted ”—R. S. O. ch. 159, sec. 145.*

Where the defendants, a road company, incorporated under the General Road Companies' Act R. S. O. ch. 159, sec. 99 of which requires them to keep their road in repair, constructed a culvert across it with a post and rail guard at the mouth thereof in such an improper manner that the wheel of the plaintiff's carriage striking the post he was thrown out of it into the open ditch at the end of the culvert and injured :—
Held, that the construction of the culvert and the guard was a thing “ done in pursuance of the Act ” within the meaning of section 145, and that therefore the time for bringing the action was limited to within six months after the date of the accident.

THIS was an action brought against the defendants for Statement.
injuries alleged to have been occasioned by the unsafe, improper and dangerous manner in which a culvert across the defendants' toll road had been constructed by them, and by reason of the guard rail across the culvert having been improperly constructed, and being in an unsafe condition at the time of the accident.

The allegations in the pleadings and the circumstances of the case as given in evidence are sufficiently stated in the judgments.

The action was tried before FALCONBRIDGE, J., and a jury, at the Hamilton Autumn Assizes, 1894, and resulted in a verdict for the plaintiff for \$500, the Judge reserving his decision as to the legal question of the Statute of Limitations, upon which he afterwards gave the following judgment.

October 26th, 1894. FALCONBRIDGE, J. :—

There is no provision in the General Road Companies Act, R. S. O. ch. 159, similar to sec. 531 of the Consolidated Municipal Act, 1892, expressly imposing or rather declaring civil responsibility for damages by reason of

Judgment. default in repair and limiting the term within which the
 Falconbridge, action must be brought.
 J.

Section 145 of the first named Act is the last of a group of seventeen sections which define certain acts to be offences if committed by the company or by individuals in the respective cases mentioned, imposing and applying penalties therefor.

Two of these sections, 132 and 133 give summary power to enforce payment of toll.

In these and in other parts of the Act I find abundant material for the application of section 145, and I think it has no application to a case like the present.

I compare the more precise and express provision of R. S. O. ch. 170, sec. 42, R. S. C. ch. 109, sec. 27, and of 51 Vict. (D.) ch. 29, sec. 287, the application of which to a case not unlike this one has been questioned by high authority.

The plaintiff is entitled to judgment.

The defendants, on December 12th, 1894, moved before a Divisional Court, composed of ROBERTSON and MEREDITH, J.J., by way of appeal from the above judgment.

McCarthy, Q.C., for the defendants. On the facts here negligence was not proved and could not be inferred: *Metropolitan R. W. Co. v. Jackson*, 3 App. Cas. 193; *Shoebrink v. The Canada Atlantic R. W. Co.*, 16 O. R. 515. The action also is not brought within the six months. It is a case of misfeasance, not of nonfeasance: R. S. O. ch. 159, sec. 145; *Selmes v. Judge*, L. R. 6 Q. B. 724; *The Corporation of Bruce v. McLay*, 11 A. R. 477, 482; *Palmer v. The Grand Junction R. W. Co.*, 4 M. & W. 749; *Venning v. Steadman*, 9 S. C. R. 206, 234. This act of commission or omission is covered by the statute: *Wilson v. Corporation of Halifax*, L. R. 3 Ex. 114; *Davis v. Curling*, 8 Q. B. 286; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Cairns v. The Water Commissioners for the City of Ottawa*, 25 C. P. 551; *Newton v. Ellis*, 5 E. &

B. 115. The date is from the time of the accident happen- Argument.
 ing: *Holland v. Northwich Highway Board*, 34 L. T. N. S.
 137; *Whitehouse v. Fellowes*, 30 L. J. C. P. 305; *Gillon v.*
Boddington, 1 R. & Mo. 161; *Lloyd v. Wigney*, 6 Bing.
 489.

Burkholder, on the same side.

Aylesworth, Q. C., and *Biggar*, for the plaintiff. The
 defendants were bound to use as much care as a munici-
 pality would be. As to the statutory limitation: *Zimmer*
v. Grand Trunk R. W. Co., 21 O. R. 628, 19 A. R. 693.
 The language of the statute there was much more
 favourable to the defendants than that here. In the nature
 of things a repair of the highway could hardly be said to
 be something done in pursuance of the Act. As to the
 difference between an act omitted and an act committed:
Rowe v. The Corporation of Leeds and Grenville, 13 C. P.
 515.

McCarthy, in reply, referred to *Fletcher v. Smith*, 2 App.
 Cas. 781; *Blyth v. Birmingham Water Works*, 11 Exch.
 781; *Hill v. The New River Co.*, 9 B. & S. 303. It is
 necessary to go back and find the proximate cause: *Beven*
on Negligence, pp. 79, 83; *Smith on Negligence*, p. 19.
 The cause here was the bolting horse, and the plaintiff can
 only have a cause of action if he can say to the defendant
 you caused my horse to bolt: see *Steele v. York*, 15 A. R.
 666. If there is a disagreement between the Canadian
 decisions and the latest English decisions the latter must
 govern, because the ultimate Court of Appeal is the Privy
 Council, when the English authorities would prevail. *Zim-*
mer v. Grand Trunk R. W. Co., 21 O. R. 628, 19 A. R.
 693, is distinguishable. The Act there protected the rail-
 way for any thing done by the railway.

February 21st, 1895. ROBERTSON, J.:—

The action was commenced on July 14th, 1894.

The accident, which the plaintiff alleges was caused by
 the negligence of the defendants, happened on January
 1st, 1894.

Judgment. The defendants (paragraph 5) plead sec. 145 of the Robertson, J. General Road Companies' Act, R. S. O. ch. 159; and sec. 531 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, and say that the action and remedy, if any, of the plaintiff, are thereby barred.

Section 145 enacts "that no action shall be brought for any matter or thing done in pursuance of this Act (R. S. O. ch. 159), unless such action is brought within six months next after the fact committed, and the defendant in any action may plead not guilty by statute, and on the trial give this Act and the special matter in evidence."

The complaint is that the defendants built and placed on and across their toll road, a culvert, which was built in an unsafe, improper and dangerous manner, and was improperly constructed, inasmuch as said culvert does not extend fully across the road, leaving on the north side of the road a very deep and dangerous excavation and the culvert was otherwise improperly constructed and maintained; and that the defendants placed and kept upon the said highway, and over and above and across said culvert, being a part of the public highway a number of posts, with a top guard-rail thereon, and the said posts and guard-rail were improperly constructed in an unsafe condition at and before the time of the happening of the accident complained of, and the defendants wrongfully continued to have said culvert and posts and guard-rail improperly constructed and maintained upon the said highway without using proper or any means of taking proper and ordinary care to warn and protect persons passing along the said highway, from getting upon or against the said rail and posts and into said culvert; whereby, and by means of the premises the plaintiff while lawfully using and passing and driving along the said highway, about 10 o'clock on the evening of January 1st, 1894, and while employing ordinary caution in the use thereof, the horse which was being driven by the plaintiff, came upon and against the said rail or posts, and the plaintiff was thereby thrown out of the buggy and fell into the

said culvert, whereby both of his legs and the tendons thereof were torn, strained and permanently injured, etc., etc. Judgment.
Robertson, J.

The defendants contend that the time runs from the date of the accident, because the wrongful act was at that date—that there was no wrongful act before that.

The facts are that the culvert was constructed, and the posts erected, years before the accident took place, but so far as the plaintiff is concerned no cause of action accrued to him until the happening of the accident in question on January 1st, 1894, and I am of opinion that the section of the Act pleaded and above referred to, limited the time for bringing that action to within six months of the date of the accident. In order to come to this conclusion, however, it is necessary to hold that the construction of the culvert and the erection of the posts was “done in pursuance of the Act,” and it appears to me equally clear that such was the case. It may be that such work was improperly done, and that there was not sufficient protection afforded by the posts and rails erected to guard the travelling public from falling into the open ditch which was left on the north side of the roadway at the end of the culvert, but that does not make it the less done “in pursuance of the Act.” I have not been able to find a case in our own Courts exactly in point, but the English authorities are numerous, which from analogy, apply to the facts now under consideration.

In *Smith v. Shaw*, 10 B. & C. 277, the question arose under an Act by which a company was established for making and maintaining certain docks and basins, and was authorized to appoint a dock master who was to have power to direct the mooring, unmooring, moving and removing all vessels into, or being in the docks, and to have the control over the space of 100 yards of the entrances into the docks, so far as related to the transporting of vessels coming in or going out; * * and if any action should be brought against any person for anything done in pursuance of the Act, such action should be commenced within six calendar months after the fact com-

Judgment. Robertson, J. mitted. An action having been brought for an injury done to a vessel (within 100 yards of the entrance of the docks), by reason of improper directions having been given by the dock master in transporting her into the docks; it was held that the giving of such directions was a thing done in pursuance of the Act, and that the action ought, therefore, to have been brought within six calendar months after such directions were given and the injury done. It was contended on behalf of the plaintiff that the reasonable construction of the statute is to confine the protection given by it to things done for the purpose of effectuating the principal object of the Act, viz., making and maintaining of the docks, and that it could not have been intended by the Legislature to give the company (who are benefited by carrying on the business of wharfingers and warehousemen) protection in cases where they are guilty of negligence in the course of their business. But Bayley, J., who delivered the judgment of the Court, said at p. 284: "A thing is to be considered as done in pursuance of the Act, when the person who does it is acting honestly, and *bonâ fide*, either under the powers the Act gives, or in discharge of the duties which it imposes, though he may erroneously exceed the powers the Act gives, or inadequately discharge the duties, yet if he acts *bonâ fide*, in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the Act, and is to be entitled to the protection conferred upon persons whilst so acting." Now here the defendants constructed the culvert and erected the posts, and no doubt did that in pursuance of the Act. It may be that sufficient care was not taken to protect the public from accidents of the nature such as befel this plaintiff, in fact the work may have been improperly done, but nevertheless such as it was, was done in pursuance of the Act.

In *Whitehouse v. Fellowes*, 30 L. J. N. S. C. P. 305, the trustees of a turnpike road converted an open ditch, which was to carry off the water from the road, into a covered drain, placing catch-pits with gratings thereon, to enable

the water to enter the drain. Owing to the insufficiency of such gratings and catch-pits, the water, in very wet seasons, instead of running down the ditch, as it formerly did before the alterations, overflowed the road and made its way into the adjoining land and injured the colliery of the plaintiff. *Held*, that a fresh damage to the plaintiff's colliery occasioned by the continuing of such insufficient gratings, etc., was a distinct cause of action, and that, therefore, an action brought within three months from the time of such fresh damage, although after more than three months from the first damage, was not defeated by the General Turnpike Act, 3 Geo. 4, ch. 126, sec. 147, which limits the action to three months after the fact committed. Judgment.
Robertson, J.

I refer to this case in order to shew that although it might have been negligence on the part of the company in the manner of constructing this culvert and planting the posts, years before the plaintiff was injured, yet that would not prevent him maintaining an action, within the time limited by the Act, from the cause of action accruing to him. In the case just referred to, Williams, J., at p. 311, says: "I must assume that an injurious act had been committed by the trustees' improper management of the catch-pits by which they had caused the water to flow into the plaintiff's pits. The question is, whether the plaintiff is bound to rely on the negligence of the trustees, when it first occurred, or whether he can maintain an action brought within three months after any fresh damage; and I am of opinion that the continuance of the tort on the highway, if accompanied by fresh damage to the plaintiff, constitutes a fresh cause of action, and that an action may be commenced in respect of it within three months from the time such fresh damage occurred." And *Gillon v. Boddington*, R. & Mo., 161, is to the same effect.

The case of *The Township of Brock v. The Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372, in my judgment, does not apply. Such decision was come to on the ground that the act complained of did not appear to have been done in the exercise of any power conferred on the

Judgment. railway company by the Act of Incorporation, or that they
 Robertson, J. or their officers could reasonably suppose they were exercising any such powers. It was an illegal act not necessarily connected with the construction of the railway, any more than the taking and appropriating to the use of the company or their contractor of a span of horses or a yoke of oxen, belonging to a farmer in the neighbourhood of the road, because it was more convenient for them to get these articles at hand, than it would be to purchase elsewhere. It was, therefore, held that the six months' limitation clause did not apply.

Having come to the conclusion after a thorough searching through the authorities, and after having considered all those referred to by both the learned counsel who appeared in support of the respective parties, that the plaintiff has commenced his action too late, it is not necessary to consider the other objections taken by the defendants. I think the verdict and judgment ordered thereon for the plaintiff, must be set aside, and the action dismissed with costs.

I have referred to the following cases, as well as those above-mentioned: *Elliott v. Allen*, 14 L. J. N. S. C. P. 136; *Holland v. Northwich Highway Board*, 37 L. T. N. S. 137; *Grant v. Culbard*, 19 O. R. 20; *Selmes v. Judge*, L. R. 6 Q. B. 724; *The Corporation of Bruce v. McLay*, 11 A. R. 477, 482; *Palmer v. Grand Junction R. W. Co.*, 4 M. & W. 749; *Venning v. Steadman*, 9 S. C. R. 206, 234; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Cairns v. The Water Commissioners of the City of Ottawa*, 25 C. P. 551; *Newton v. Ellis*, 5 C. & B. 115; *Whitehouse v. Fellowes*, 30 L. J. C. P. 305; *Zimmer v. Grand Trunk R. W. Co.*, 21 O. R. 628, 19 A. R. 693.

MEREDITH, J. :—

The first ground of this motion is the most formidable, and is, in my opinion, enough to defeat the action.

The facts are simple, and, to my mind, the case is plain.

The defendants are a road company, incorporated under Judgment.
“The General Road Companies Act”; and are required, Meredith, J.
by section 99 of the Act, to keep their road in repair.

In performance of that duty so imposed, they put up, at the place in question, the posts and railing in question, as a guard against the open drain at the mouth of the culvert in that part of the road. That this was done under that statute-imposed duty is made more abundantly clear by reason of it having been done in consequence of a complaint made to the Judge of the County Court, under section 100 of the Act, that the company were collecting tolls after suffering their road to get out of repair. It is not material whether the erection of the railing was suggested by the engineer appointed by the County Court Judge or not, for it is plain that it was done to remedy the state of disrepair complained of, and so to avoid the penalties which might be imposed on account of that state of disrepair.

The accident was caused by the plaintiff's carriage striking one of these posts. There probably would have been no injury, at that place at all events, but for this post; for, apparently, the horses and carriage were clear of the railing all but the outside part of the hub of one of the wheels which seems to have struck the post and so caused this accident; so that the horses and carriage would have gone quite clear of the open drain had there been no guard there.

Little, if anything, however, is gained by surmises; it is enough that that guard so placed there caused the injury.

And that being so, it seems to me that section 145 of the Act applies; and, accordingly, that the action, not having been commenced within the six months, fails.

The placing of the guard there was something done in pursuance of the Act, and it was that which caused the injury. The thing done, which caused the injury, was the putting up and maintaining of that railing there, and that was done in pursuance of the Act, in performance of the duty to repair imposed by section 99.

Judgment.
Meredith, J.

The effect of section 145 cannot, in my judgment, be circumscribed as it has been in the judgment in appeal. There may be in various provisions of the Act that which may appear to some more than enough material for the application of legislation of this character without including cases such as this; but every case fairly coming within the meaning of the words of this section must nevertheless be included.

It was urged by Mr. Aylesworth that there was no reason why there should be any special limitation of actions of this kind in favour of companies incorporated under the Act; it is, however, quite usual, if not invariable, where such statutory duties are imposed, to provide a short period of limitation to actions for injuries caused in the performance of them, in cases where such actions would lie: and it is not to be lost sight of that at common law no such action for injuries caused by nonrepair of a public highway would lie, nor will it now in many cases unless such a remedy is given by statute: see *The Municipality of Pictou v. Geldert* [1893] A. C. 524; *Crowley v. The Newmarket Local Board*, [1892] A. C. 345; and *The Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 411.

But it seems never to have been doubted that such an action would lie against such a company as this: see *March v. The Port Dover and Otterville Road Co.*, 15 U. C. R. 138, and *Campbell v. The Kingston and Bath Road Co.*, 18 A. R. 286, and 20 S. C. R. 695.

Then it was urged that, if the section applied at all, this case was one of nonfeasance not misfeasance, and, therefore, not a case of any "matter or thing done," or any "fact committed" within the meaning of the Act; and no doubt in one sense—in a round-about way—that may be said; it may be said, in such a way, that, if the defendants be answerable, it is for an omission to fully perform the statute imposed duty to keep the road in repair; but so too, it might be said, in almost, if not quite, every case of this character, that the injury was caused by an omission of duty; but the direct cause of the injury was the doing of

something in pursuance of the Act, which, if the plaintiff succeed, must be shewn to have been so improperly done as to amount to actionable negligence. It is not as if some third person had put the post there, nor as if the defendants had merely left an obstruction—for instance had left a cart—in the highway: what was done was something honestly intended to be done in performance of the duty to repair. It would be an odd way of making the cause of the injury a mere omission of duty to hold that because they did not remove that which they had made for the one purpose of repairing the road and do something else instead, therefore, they are liable,—that that accident was not caused by the posts but by the omission to remove the guard and extend the culvert the whole way across the road by way of repair.

Judgment.
Meredith, J.

So that here it was directly a case of commission, not mere omission; the fact committed was the placing and maintaining of the obstruction (if it were one) there; the cause of the accident was the thing done; there might, and probably would, not have been any injury to the plaintiff by reason of the road if nothing had been done.

But whatever might be one's view of the case apart from authority, the authorities are, in my opinion, conclusive in the defendants' favour on both points. Such cases as *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Nelson v. Corporation of Halifax*, L. R. 3 Exch. 114; *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Newton v. Ellis*, 5 E. & B. 115; *Davis v. Curling*, 8 Q. B. 286, and *Edwards v. Vestry of St. Mary's, Islington*, 22 Q. B. D. 338, shew that the section in question is applicable to a case of this kind, and that it is a case of misfeasance; and some of them decide also that even in a case of omission to do something required by the Act it would yet be within the meaning of the section. They are all cases under an Act which contained the words "for anything done or intended to be done under the provisions of this Act," and provided for the giving of a month's notice of action only, and so did not contain the words "fact committed," but I cannot

Judgment. see how that can make any difference. *Holland v. North-*
Meredith, J. *wich Highway Board*, 40 J. P. 517, and 34 L. T. 137,
however, is a case under a statute containing the latter
words also, and is a case under the Highways Act and
quite in point. That "fact committed" may mean injury
sustained by the continuance of a nuisance, is made plain
by such cases as *Whitehouse v. Fellowes*, 10 C. B. N. S. 765.

Although the cases in the Courts of this Province may
not all be quite in accord with all that has been decided
in the cases I have just mentioned, there is nothing that I
have found in any of them conflicting with the view I
have taken of this case, namely, that the facts shew a case
of misfeasance—a thing done in pursuance of the Act.
In the case of *March v. Port Dover and Otterville Road*
Co., 15 U. C. R. 138, relied upon for the plaintiff, it is said
that "if the evidence had shewn that the defendants in
order to repair or improve the road had dug a ditch or
done something else in a careless manner, without using
the necessary precautions, and if they were sued for an
injury arising from their doing what they had done negli-
gently, then we think they would have been entitled to
the privilege given by the clause." The clause was the
original of the section of the Act now in question which
then contained additional words giving leave to plead the
general issue only and give the Act and the special mat-
ter in evidence on the trial of such actions. So that that
case is in the defendants' favour on both questions; the
words quoted fairly cover this case.

Even the case of the *Borough of Bathurst v. Macpherson*,
4 App. Cas. 256, is now authoritatively stated to have been
one of misfeasance not of nonfeasance: *Municipality of*
Pictou v. Geldert, [1893] A. C. 524, at p. 531.

So that there seems to me no room for doubt that, upon
the authorities, this case is one of misfeasance.

Then the cause of action (if any) proven is one for
injuries sustained through the negligence of the defendants
in the performance of their statute-imposed duty to keep
the road in repair, that is, in placing and maintaining the

post which caused the accident, and the action was not Judgment. brought within six months after the things done, the facts Meredith, J. committed, the placing, and maintaining at the time of the accident, the obstruction there; it therefore fails, however much it may be to be regretted that so short a delay beyond that period prevents the plaintiff having his claim heard and determined upon the other questions in issue between the parties. Where an arbitrary line has to be and is drawn, a definite time fixed, to overpass it at all is to overpass it altogether—whether it be moments or months can make no difference.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE GRAY.

Infant—Sale of Lands—Estate Tail—R. S. O. ch. 137, sec. 3.

APPLICATION for a ruling as to whether the estate of an Statement. infant, being an estate tail in possession, could be sold under the Act respecting infants, R. S. O. ch. 137.

H. J. Scott, Q. C., for the applicant, referred to secs. 3, 7 and 8 of R. S. O. ch. 137; sec. 6 of R. S. O. ch. 103, and Rules 992 *et seq.*

J. Hoskin, Q. C., for the infant.

March 15th, 1895. BOYD, C. :—

I think the Act applies to the case of an estate tail.

A. H. F. L.

[CHANCERY DIVISION.]

FARQUHAR V. THE CORPORATION OF THE CITY OF TORONTO.

Chose in Action—Contract—Right of Contractee to make Deductions—Assignment of Benefit of Contract—Rights of Assignee—R. S. O. ch. 122, secs. 6-13.

A contract between the defendants and the plaintiff's assignor for the paving of a certain street provided that the former might deduct and pay the price of any materials unpaid for by the latter. The contractor assigned to the plaintiff all moneys to become due under the contract, of which the defendants were duly notified. Subsequently the defendants deducted from the contract moneys the amount of a claim for materials furnished to the contractor and paid the same:—

Held, that they had a right so to do, the plaintiff's assignment being necessarily subject to the provisions of the original contract.

Statement. THIS was an action brought to recover the sum of \$694.55 alleged by the plaintiff to be due and payable under a certain contract made between the defendants and one E. M. Cathro for the paving of a street in Toronto, the benefit of which contract, the plaintiff claimed to be entitled to by virtue of an assignment dated September 23rd, 1893.* The plaintiff alleged that on the faith of such assignment he had supplied Cathro with money to carry on the work, and had also supplied him with large quantities of material.

The defendants pleaded that they had discharged and satisfied the sum claimed by payment to a firm of the name of Taber Bros. under the circumstances, and relying upon the clause in the contract, set out in the judgment of BOYD, C.

The action was tried at Toronto on October 11th, 1894, before ARMOUR, C. J., who held that the plaintiff took, and knew that he took, subject to the provisions which were in the contract, and that his equity was subservient to the right of the corporation to pay persons furnishing material, and he dismissed the action with costs.

*The contract was not actually signed until October 24th, 1893, after the assignment to the plaintiff.

The plaintiff moved on December 18th, 1894, by way of Argument.
appeal before the Divisional Court consisting of BOYD, C.,
and MEREDITH, J.

Riddell and Smyth, for the plaintiff. When our writ was issued, there was not the first step taken by the city to enable them to pay Taber Bros. The right of Cathro's assignee is different to that of Cathro: R. S. O. ch. 122, secs. 7, 11 and 12. The debtor has no right to make defences for himself after notice of the assignment: *Brice v. Bannister*, 3 Q. B. D. 569.

[BOYD, C.—If he were assignee of the whole contract, would he not be subject to what is provided in the contract itself?]

But without anything calling upon them to do it, they have changed our position by making a payment: *Bank of British North America v. Gibson*, 21 O. R. 613; Am. and Eng. Ency. of Law, 'Choses in Action,' vol. 3, p. 236, n. 8; *ib.*, vol. 1, p. 840, n. 3. As to the effect of defences arising after the assignment, see *Op. cit.* vol. 1, p. 842.

Delamere, Q. C., for the city, referred to *Brown v. Johnston*, 12 A. R. 190.

February 21st, 1895. BOYD, C.:—

Part of the contract (found in the eighteenth condition) provides that "The corporation may, on recommendation of the city engineer, settle any claim for damages on account of the works, and pay all wages overdue two weeks or the price of any materials for which payment is in arrear, and may deduct the amounts thereof from any moneys due or falling due to the contractor on this or any other contract with the city." That is, the amount payable to the contractor may be diminished by the amount of claim for material furnished to him for which he has not paid at the option of the corporation.

On September 23rd, 1893, the contractor confirmed a general assignment made by him of all moneys payable by

Judgment.

Boyd, C.

the corporation on contracts, and made it specifically applicable to the moneys to become due under this contract for paving Church street, whereby the plaintiff became the assignee of all such moneys. Of this the city was duly notified. An engineer's certificate was given for work done under the contract up to December 20th, whereby \$3,273 was certified to be due to the contractor. From this the city deducted \$694, being the amount of a claim for materials furnished by one Taber to the contractor in respect of this work, which was retained by the city and was pending action paid to this material man as money to which he was justly entitled.

The question is, whether this right of deduction exists after the assignment to the plaintiff. The appellants rely on R. S. O. ch. 122, sec. 12, which provides that the assignee of a chose in action shall hold and enjoy the same free from any claims, defences, and equities, which may arise after notice of the assignment as against the assignor. Section 7, however, provides that the assignment shall be subject to such conditions and restrictions with respect to the right of transfer as are contained in the original contract. That means that the contractor's right to make a transfer of the moneys falling due under the contract is subject to the terms and conditions of the contract, and one of them in this case is the right to deduct for the benefit of material men. That would be, I think, the proper position to take as a matter of law, even if the statute did not say so. This point is adverted to by Mr. Justice Burton in *Garner v. Hayes*, 10 A. R. 24.

I would affirm the judgment with costs.

MEREDITH, J. :—

The fallacy in the plaintiff's contention lies in assuming that there ever was a debt due from the defendants, absolutely, in respect of the money in question, that there ever arose an unconditional right of action against them for it.

By the terms of the contract that money never became payable by them, if they chose to apply it, as they did, in payment of the workmen employed, and for materials used, upon the works contracted for. Judgment.
Meredith, J.

So that what the plaintiff got by his assignment was, at the most, only the highest right which the contractor had; that is, the right to the contract prices earned, conditional upon and subject to the right of the defendants to pay the workmen and to pay for the materials.

Assuming that the Act relied upon by the plaintiff—R. S. O. ch. 122, secs. 6-13—applies to this case (a case in which there existed at the time of the assignment no debt or chose in action, there was but a contract awarded but not entered into or perhaps in any way binding upon either party,) if I am right in what I have said, the plaintiff gets no aid from it; the debt or chose in action there referred to, is the debt which remains after satisfaction of the condition in respect of wages and materials in so far as the defendants elected to exercise their right to pay them; and the words of sections 7, 11 and 12 of the Act, upon which the plaintiff's whole case was supported, have reference to what remains after such payments, the balance is the *debt* assigned: obviously, I would have thought, an assignor cannot assign more than he has, more than he has any right to.

Such cases as *Farquhar v. The City of Toronto*, 12 Gr. 186, and *Brice v. Bannister*, 3 Q. B. D. 569, (see also *Bank of British North America v. Gibson*, 21 O. R. 613), have no application here; there there was, or became, a debt absolutely due and payable by the defendants to the assignors, and the defendants, after notice of the assignments, paid *those* debts to, or settled them with, the assignees, and accordingly were held unreleased from the assignees' rights to them and yet liable to pay them.

Tooth v. Hallett, L. R. 4 Ch. 242, and *Garner v. Hayes*, 10 A. R. 24, though not quite in point, come nearer to this case, and, indeed, the former goes further than need be gone in this case to reject the plaintiff's claim. While

Judgment. such cases as *Webb v. Smith*, 30 Ch. D. 192, and *Roxburghe*
Meredith, J. *v. Cox*, 17 Ch. D. 520, contain indorsements of the just
general rule that an assignor can give no greater right in
equity than he himself possesses; and in *Buck v. Robson*,
3 Q. B. D. 686, Cockburn, C. J., in delivering the considered
judgment of the Divisional Court, says, pp. 690-691:—"It
is one thing to say that, where a creditor assigns to a third
party a debt accruing due, the right of the assignee, if the
debt actually becomes due, cannot be derogated from by
any *independent liabilities* of the creditor to the debtor
subsequently arising—a very different thing to say that
liabilities of the creditor to the debtor *arising out of the*
contract, before the debt becomes due, may not be taken
into account."

I do not think it can be successfully urged that the provisions of the Act were intended to enlarge the rights in equity of the assignee in these respects. The 7th section expressly provides that "the assignee thereof shall sue thereon * * for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province."

It seems to me, therefore, that the learned Chief Justice was undoubtedly right in his view of this case, and in directing that judgment be entered for the defendants, and I would accordingly dismiss this motion with costs.

A. H. F. L.

[CHANCERY DIVISION.]

KEATING V. GRAHAM.

*Sale of Goods—Action—Mistake of Vendor as to Identity of Vendee—
 Fraud—Judgment—Vacating Judgment Against Supposed Vendee—
 Action against True Vendee—Proceedings Without Leave after Wind-
 ing-up Order—Nullity—R. S. C. ch. 129, sec. 16.*

A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered as in his former capacity certain goods from the plaintiff, who subsequent to the transfer supplied the goods ordered which were used by the syndicate, and he afterwards took a note of the company for their price, on which when dishonoured he sued and obtained judgment against the company, being, however, all the time, ignorant of the circumstances above mentioned. About a week prior to the judgment a winding-up order was obtained against the company, hearing of which the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards before trial he obtained *ex parte* an order vacating the judgment against the company :—

Held, that the plaintiff was entitled to recover from the syndicate the price of the goods :—

Held also, *per* ROBERTSON, J., that the judgment vacated was absolutely null and void, having been obtained after the winding-up order without the leave of the Court.

Per MEREDITH, J., the judgment was at any rate irregularly entered, and when set aside, was as if it had never existed.

THIS was an action brought by E. F. Keating against certain persons who, as he alleged, had been until lately carrying on business in Toronto as machinists and manufacturers under a partnership agreement, by which they were known as "The Polson Lenders," for the prices of certain boiler pipes and tubes, which he alleged he had sold to them in June and August, 1892. Statement.

The action was tried at Toronto on October 15th, 1894, before ARMOUR, C. J., without a jury, who gave judgment for the plaintiff.

The defendants on December 13th, 1894, moved by way of appeal before the Divisional Court, consisting of ROBERTSON and MEREDITH, JJ., to set aside the judgment.

Statement. The following statement of facts is extracted from the judgment of ROBERTSON, J., upon the motion :—

Up to and prior to June 29th, 1892, The Polson Iron Works Co., (Limited), carried on business in Toronto as manufacturers of steam boilers, etc., and in the course of their business required boiler tubes, stay tubes, etc.; and on June 23rd, 1892, ordered from the plaintiff, who carries on business in New York, by letter of that date, a quantity of boiler and stay tubes. On June 24th, 1892, the plaintiff acknowledged receipt of the order, but stated that he did not think it would be possible to fill it before the middle or latter part of July, as there was a prospect "for a very extended strike here among the iron workers." Further correspondence took place between the plaintiff and The Polson Company, which extended to 15th July, 1892, and on July 14th, 1892, "F. B. Polson, managing director," wrote to say, "It is now too late for us to order these tubes from England, and I presume you can fill the order as soon or sooner than any other American firm. You understand the position we are in, and it will cost us a serious loss if we do not receive them the first week in August; so kindly do your best for us, and rush the order out as soon as possible." On July 15th, 1892, the plaintiff replied, "Your favour of 14th inst. to hand and contents noted. In reply to same would state that I have no doubt but that the tubes in question will be shipped in time for you to receive them in first week in August."

On August 5th, 1892, the goods were shipped to Toronto to the value of \$391.92, after deducting \$12.63 freight, which with interest up to November 1st, 1894, amounted to \$442.87, for which judgment was given for the plaintiff.

It is necessary now to go back to a period anterior to the delivery of the goods in question, viz., June 29th, 1892, on which day The Polson Iron Works Co., entered into an agreement in writing with these defendants, in which they call themselves "The Lenders," they having already made,

and having agreed to make, certain advances to the com-
pany, and having become responsible on certain promissory
notes for the company, and in which it is recited that the
company expected to enter into contracts for the execution
of new works from time to time and to receive orders for
the execution of works, and in order that the same might
be advantageously executed and performed, the company
had requested "The Lenders" to take sub-contracts for
the execution and performance of such works, and "The
Lenders" had signified their willingness to comply with
such request from time to time, provided that the terms
and conditions of such contracts and the nature of the
work contracted for should be satisfactory to them.

Then the agreement witnesseth *inter alia*, that as
further security for the indebtedness of the company to
"The Lenders," or any of them, already made, and to
secure the liability already incurred, the company shall
execute and deliver to "The Lenders" a valid chattel
mortgage or mortgages upon the goods and chattels men-
tioned in the schedule annexed to the agreement, and
which seem to be the whole of the machinery, tools, goods,
wares, materials and engines, used and owned by the com-
pany in Toronto, valued at \$21,655; together with all
similar machinery, tools, goods, wares, material, lumber,
oakum, rope, blocks and plant used and owned by the
company at their shipbuilding works at Owen Sound,
valued at \$15,651. And as security for the repayment of
such future advances in accordance with such agreement,
the company should execute and deliver to "The Lenders"
a valid chattel mortgage upon the said goods and chattels,
and that the company should, by a proper and valid
assignment, transfer to "The Lenders," or to whom they
may appoint, all debts, accounts and moneys now due or
owing to the company by all persons, firms and corpora-
tions in respect of the purchase money of goods, wares and
merchandise sold, or which may thereafter be sold, by the
company, and in respect to all work and labour done by
the company and materials provided by the company, or

Statement.

Statement. which might thereafter be done or provided for them respectively, and all contracts, securities, bills, notes, etc., then held, or which might thereafter be taken by the company in respect of the said debts, etc., which "The Lenders" were to hold as security for the then existing and all future indebtedness of the company to "The Lenders," or any of them. And that the company should at the time of giving possession of the said goods and chattels give possession to "The Lenders," or to whom they might appoint, of the premises in Toronto and Owen Sound in which the company carried on business, and all plant, tools, machinery, chattels and things in, upon, and about the said premises, and also of all works, machinery and other articles which the company is performing, building or making for its various customers.

And it was also provided in and by the said agreement that "The Lenders" might make use of the company's premises, plant, tools, machinery and other things, and employ the company's workmen in completing any of the contracts, works and orders on hand, and deliver to the purchasers or other persons for whom such works, etc., are performed, the completed articles, and receive from them payment therefor, etc. And that all moneys which might be advanced by "The Lenders," or any of them, on completion of the said works, contracts and orders, should be secured by the said chattel mortgages and securities above mentioned, and should be a first charge upon, and should be repaid out of the moneys received from and on account of such completed article. And, further, that in completing any of the said works, contracts and orders, "The Lenders" may use such raw material and other articles on hand belonging to the company as they may think proper, and whether included in the chattel mortgages above mentioned or not.

In fact, it looks as if the incorporated company was transferring all its belongings of every name, nature and quality to "The Lenders," who were, in fact, the chief stockholders of the company, if not the whole of them. The ninth paragraph of the agreement is in the following words, viz. :—

“9. The company shall not enter into any new contracts or undertake the execution of any new orders or works without first submitting to “The Lenders,” or to whom they may appoint, such contract, orders, and works, and receiving the assent of “The Lenders,” or such person as aforesaid to the making of such contracts or the accepting of such orders and upon such contracts being made or such orders accepted with such assent, the company will, if “The Lenders” so require, authorize “The Lenders,” by way of sub-contract to do the works under such contracts and orders on the following terms, viz. :—

Statement.

Such works and orders to be done upon the company’s premises at Toronto or Owen Sound, as may be most convenient, the company’s tools, plant, machinery, raw materials and other articles, and workmen being used and employed for that purpose ; the property and possession of all machinery and other articles and works undertaken by ‘The Lenders’ by way of sub-contract as aforesaid to be vested in ‘The Lenders’ until full completion and delivery thereof to the persons for whom the same may be built, made and performed ; and the property and possession of all raw materials and other articles procured for the purposes of and in connection with such machinery, articles and other works are to be vested and remain in ‘The Lenders.’ All moneys payable for or in respect of such contracts and works by those for whom the same are being executed and done shall be paid to and are hereby assigned to ‘The Lenders.’”

Then it appears by the evidence that “The Lenders” took possession of the company’s works, etc., under the agreement on July 8th, 1892, and all the material on the place ; and they appointed F. B. Polson, who had been the manager of the company, to be the manager of the works for “The Lenders,” and who was and is one of them then in possession. And the goods in question were shipped by the plaintiff about a month after, and were received from the plaintiff by “The Lenders,” and used by them in carrying out the contracts, works and orders,

Statement. which "The Lenders" carried out after the date of taking possession, and had the benefit of them.

The plaintiff had no notice or knowledge of the agreement, nor that the company had given up possession of their works and plant to "The Lenders," nor that "The Lenders" had really received or used the said tubes in question in carrying on the said works. And matters went on in this way until September 1st, 1892, when the plaintiff received and took a promissory note from the Polson Iron Works Company, payable in four months thereafter, for \$499.58, being the amount of this account for the said tubes and some other tubes that had previously been sold and delivered to that company. This promissory note was not paid, and the plaintiff brought an action against the company in this Division, and no defence being entered thereto, judgment was signed on February 13th, A. D. 1893, for the full amount with interest and costs; but without the plaintiff having any knowledge of the fact, an order was made on the 8th day of the said month of February for winding-up the said company, under the R. S. C. ch. 129 and amending Act. Upon this proceeding for winding-up coming to the knowledge of the plaintiff or to the knowledge of his solicitors, immediate steps were taken for vacating the judgment, and on June 5th, 1893, an order was made vacating and setting aside the said judgment.

The plaintiff, however, had in the meantime discovered that the goods sold by him, were actually delivered to and used by "The Lenders," and not to The Polson Iron Co., and on March 8th, 1893, they commenced this action for the price thereof with the result already stated.

Moss, Q. C., for the defendants. On the question of election, I refer to *Toronto Dental Manufacturing Co. v. McLaren*, 14 P. R. 89. The contract was entered into and completed after we took over the business. The defendants did not occupy any position in which they ever became contractors with Keating. The mere fact that we got the

benefit of the goods does not create the legal liability. Argument.
 Polson was acting entirely as manager of the company in ordering the goods. The plaintiff himself did not regard any one but the company as liable. This is clear in the evidence. They elected, and they are bound by their election: *King v. Hoare*, 13 M. & W. 494; *Kendall v. Hamilton*, 4 App. Cas. 504.

Walter Read, for the plaintiff. I refer to the Winding-up Act, R. S. C. ch. 129, sec. 16; *Hartford v. The Amicable Mutual Life Assurance Co.*, 5 Ir. C. L. (Q. B.) 368.

[MEREDITH, J.—When you commenced this action you had a judgment against the company. Ought you not to have got rid of that judgment before you began it?]

We had a judgment which never was a good one, being in contravention of the Act of Parliament: *In re Artistic Colour Printing Co., ex parte Fourdrinier*, L. R. 21 Ch. D. 510; *Thomas v. Wells*, 16 C. B. N. S. 508. The defendants have got possession of the goods supplied, but will not pay for them. The defendants were operating the works for themselves. They were practically in the position of mortgagees in possession. On the question of goods delivered, see *Weatherby v. Banham*, 5 C. & P. 228. The order was the order of the defendants. The company could get no benefit from it; it was hopelessly indebted to the directors.

Moss, in reply. This is not a question of estoppel, but of merger, as pointed out in the *Toronto Dental Case*. If the cause of action was merged in the judgment, we can shew under our denial of liability that they cannot have a cause of action against us. The effect of the judgment was to merge the cause of action, and it cannot be revived: *The Belcairn*, 10 P. D. 161; *Odell v. Cormack*, 19 Q. B. D., at p. 228. You cannot prejudice a third party by the plaintiff's order to set aside the judgment. The liquidator might have moved against the judgment, but the Court might have allowed it to stand. Polson had no right to give any orders for the defendants. There was no partnership between them. There can be no implied contract where there is a special express contract.

Argument. [MEREDITH, J.—But it is said the express contract was never carried out.]

The goods came to the defendants with the privity and consent of the Polson Company, who gave a note for the goods.

February 21st, 1895. ROBERTSON, J.:—

The action is brought to recover the price of goods sold and delivered to the defendants, who, as the plaintiff alleges, were until lately carrying on business in the city of Toronto as machinists and manufacturers under a partnership agreement, by which they were known as The Polson Lenders. The value of the goods sold is \$488.20.

The defendants deny that they have been carrying on business in partnership as alleged; and they deny that the plaintiff sold and delivered to them the goods as alleged, being boiler pipes and tubes.

The action was tried before Armour, C. J., at the last Toronto Fall Assizes without a jury, and he ordered judgment to be entered for the plaintiff for \$442.87, with full costs of suit.

The motion is by way of appeal from that judgment, and asks for an order dismissing the action with costs, upon the ground that the decision appealed from is contrary to the law and the evidence and the weight of evidence, and that upon the evidence the plaintiff is not entitled to recover from defendants any sum in this action, etc. The facts are as follows: "[The learned Judge then set out the facts as above, and continued:—]

It is now contended, although no such defence was spread out on the record,—that certainly was necessary in my judgment,—that inasmuch as the plaintiff had accepted the promissory note of the company who had originally ordered the goods, and had, moreover, recovered judgment on such note, he could not now pursue these defendants.

The answer to that is, apart from the absence of a defence to that effect being set up on the record, that in the

first place the plaintiff was in entire ignorance of the before mentioned agreement, that he knew nothing of the defendants having taken possession of the company's works and that they were carrying on and continuing the business which the company had been engaged in; nor that the defendants had received his goods and worked them up for their own benefit at the time he took the promissory note, nor at the time he brought his action thereon, nor did he have any knowledge of the winding-up order until a long time after he had recovered his said judgment; and moreover, that there is no judgment now in existence in his favour against the Polson Company for the price or value of the goods sold by him, and that the judgment which he did recover, apart from the order made vacating the same, was to all intents and purposes invalid and of no force and effect, by reason of the 16th section of the Winding-up Act, R. S. C. ch. 129, and the plaintiff refers to and cites *Hartford v. The Amicable Mutual Life Assurance Co.*, 5 Ir. C. L. (Q. B.) 368, where it was held that a judgment entered against a company after an order for winding it up will be set aside at the instance of the official liquidator, as a proceeding inhibited by sec. 87 of the Companies' Act, 1862 (25-26 Vict. ch. 89), although neither the plaintiff nor his attorney had notice of the winding-up order at the time of entering the judgment.

He also refers to *In re Artistic Colour Printing Co.*, 21 Ch. D. 510, in which it was held that where an execution against the goods of a company which is being wound-up is avoided by the Companies' Act, 1862 (25-26 Vict. ch. 89), it is avoided altogether and the creditor retains no interest under it. Jessel, M. R., said at p. 512: "According to the plain terms of section 163" (which is identical with section 16 of the Canadian Act) "the execution is void to all intents, there is, therefore, no force left in it."

In my judgment the plaintiff's contention is correct. The judgment obtained by him, was in direct conflict with the 16th section of the Winding-up Act, which declares: "When the winding-up order is made no such action or

Judgment. other proceeding shall be proceeded with or commenced
Robertson, J. against the company, except with the leave of the Court, and subject to such terms as the Court imposes." The winding-up order, was made on February 8th, 1893, the writs in the action had been served at that time, but the making of this order to all intents and purposes inhibited further proceedings. The judgment subsequently recovered in ignorance of such order, had, therefore, no force or effect, in fact, was absolutely null and void, and the order vacating it was properly made. I am not quite satisfied that any order was necessary, as all proceedings in the action from the issuing of the order was by force of the statute stayed, but I think the plaintiff did right in vacating his judgment, after he had been made aware of the winding-up order. This being so the plaintiff is to be considered as having no judgment on the promissory note sued upon. I have considered this latter question apart from the question of pleading, because counsel for the defendant having urged the judgment as a bar to the plaintiff recovering against these defendants, and counsel for the plaintiff not having taken an objection as to the want of a plea, and cited authorities pro and con., I think it better to dispose of it on that ground, although I am clearly of opinion the defendants have no right to urge the judgment as a bar now.

Then comes the question, having taken a promissory note for the price of the goods sold in ignorance of the facts in regard to who actually received such goods, has he not the right to say, I thought I was dealing with The Polson Iron Works Company, my information was by written correspondence, I supposed I was selling to that company, and the name of that company was used by one who had the authority of these defendants to order and buy goods from me; that was really a fraud on me. The manager of the defendants knew that The Polson Iron Works Company had not received my goods. On the contrary he knew that he had received them for these defendants, and they became vested with the property, and they were used by them in

carrying on their works. I therefore repudiate the promissory note transaction, and fall back on the undisclosed principals who received the goods from me and got the benefit of them. I think he has the right to do this, and that the learned Chief Justice was right in giving a judgment in his favour. The appeal should therefore be dismissed with costs. The case of *Weatherly v. Banham*, 5 C. & P. 228, decided by so great and eminent a Judge as the late Lord Tenterden, C. J., it appears to me, is sufficient authority for that.

Judgment.
Robertson, J.

MEREDITH, J. :—

This is not the case of a purchase by an agent in his own name for an undisclosed principal. The purchase was made by the defendant Polson in reality for himself and his co-defendants. They received and used the goods for their own benefit. The Polson Company was in reality in no way concerned in the transaction. The goods were purchased after they had given up possession of their works to the defendants under an arrangement by which they were not to be liable for the debts of the business, nor to have substantially any benefit from it. They were practically, so far as carrying on the works and the expenses incurred therein including obviously such debts as that in question, went, in the same position as if there had been an absolute sale of the concern by the company to them. What right, what authority in fact, had the defendant Polson to order the goods for the company or to pledge the company's credit for them? In my opinion none whatever. I am not dealing with the question whether, under the circumstances, the company would have a valid defence in law against a claim for payment on the ground that, though not really liable, they would be estopped from making such a defence. The point is that they had no concern in the purchase, that the defendant Polson had no authority for using their name in the transaction as a matter of fact. Then why did he use it?

Judgment. The reason seems to me plain, though it affords no valid excuse for Mr. Polson or Mr. Barrett, or anyone else, making such use of it. The reason is that it was in the defendants' interest to finish the contracts as soon as possible, to avoid all delay, and to get the work taken in hand finished and paid for without any explanation of changed circumstances which might prevent or delay the completion of the work. The correspondence shows that an early delivery of the goods in question was a matter of particular urgency; that delay must be avoided. Doing the straightforward thing—informing the plaintiff of the changed circumstances—would certainly have caused some delay, might possibly have ended in the plaintiff's refusal to fill the orders, and so, to some extent at least, the business of these defendants was carried on, so far as incurring liability went, in the name of the company without authority and improperly. Mr. Barrett, one of the witnesses, tells us that he was assistant manager and that Mr. Polson was general manager of the works for the defendants; that the company was not doing any work there, but the defendants did everything, yet the correspondence was carried on on the company's letter paper, as used in the correspondence between Mr. Polson and the plaintiff, and that, though acting for the defendants and in no way for the company, he always signed "Polson's Iron Works Co.," and that he so signed all letters he wrote for the defendants.

There seems to me to be no manner of doubt that the learned trial Judge was right in holding that in these circumstances the plaintiff might look to the defendants for payment for the goods in question; that is those purchased and delivered after the defendants took possession of, and while they alone were carrying on, the works. It seems to me that, even if it cannot be said that the defendant Polson lawfully might and did buy the goods for the defendants, it is clear that they cannot repudiate his unauthorized act and yet retain the benefit of it; that they would be bound to reject or return the goods if they

wished to escape paying for them. There is no pretence Judgment.
that they bought them from the company, nor that they Meredith. J.;
are liable to pay them or anyone else the price or value of
them. They keep the property, benefit by it to its full
value, and seek to avoid payment altogether. It seems to
me quite open to the plaintiff to say, there was no sale of
the goods to the company in reality, they were yet our
property; you took them and used them, and must pay at
least their market price. No question of the *jus tertii*
seems to me to arise here, for if, as the defendants contend,
the property and possession passed to the company under
the dealings between the defendant Polson and the plaintiff,
trover, of course, would not lie; that action would be
the company's; the goods would have been in their posses-
sion when used by the defendants; if they did not so pass
there would be no *jus tertii* in fact.

But, to my mind, the difficulty in the plaintiff's way is
rather the judgment which he recovered against the com-
pany upon the contract with the defendant Polson in the
company's name, under colour of his office of its general
manager, for the price of the goods in question. A diffi-
culty which the cases make much greater than I would
without the weight of them have thought.

Though the act of the defendant Polson in dealing in
the company's name and purchasing these goods for the
defendants upon the company's credit was an unauthorized
and improper act, yet it was one within the scope of his
implied authority as managing director of the company,
and so binding upon the company if the plaintiff chose to
hold them to it; but he might forego or not choose to
enforce that legal right, and, if the contract were really the
defendants, enforce it against them as undisclosed princi-
pals, or, if not their contract, maintain trover for the value
of his goods converted by them. He did sue the company
to judgment, and did prove his claim against them in the
winding-up proceedings; but without knowledge of the
facts, and in the reasonable belief that the company were
really the purchasers in the ordinary way of business.

Judgment. The judgment was signed—in default of appearance—before this action was brought, but was set aside by the Master in Chambers on an *ex parte* application of the plaintiff on the ground that it was signed in contravention of the provision of the Winding-up Act, that “when the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court imposes.” Though that order appears now to have been rightly made, I desire to say that it ought not to have been made *ex parte*, and with regret to add that the frequent saying of it does not, unfortunately, prevent the error. Proceedings are not to be taken behind the backs of persons concerned, especially when they can be readily notified, because their opponents may assert, or it may, upon the case as presented, seem plain that the order sought will not affect them prejudicially, but will be for their benefit; they may be able to put a very different light upon the subject, and anyway, it is their right to have the opportunity of doing so. But the question now is, are they prevented from recovering in this action by reason of that judgment having been once obtained, or by reason of its existing when this action was brought?

In *Toronto Dental Manufacturing Co. v. McLaren*, 14 P. R. 89, to which we were referred, the plaintiffs applied to set aside their own judgment against a father and son for the price of goods sold and delivered, so that the plaintiff might sue the wife and mother, as an undisclosed principal of the father and son, was refused, it being there held by Rose, J., at Chambers, that in the absence of fraud or mistake the Court would not grant the plaintiff the extraordinary relief of vacating their own judgment against the defendants to allow them to proceed against the married woman; and it was said that “the simple contract debt became merged in the judgment debt,” and that “so long as the judgment stands no action can be brought on the original cause of action against the principal,” which no

doubt is so, but the ground of the motion in that case being fraud, fraud in concealing the true debtor—in ob-
 taining goods in the name of irresponsible persons so that the responsible one might escape—and in causing judgment to be signed accordingly, fraud on the part of the three, might not an action have been brought to set aside the whole thing contract and judgment and to recover from the married woman the property or its value ?

In *The Belcairn*, 10 P. D. 161, it was held that a consent judgment at the trial could not be set aside by an order of a registrar obtained as a matter of course, and it was strongly intimated that the Court itself—even if it had jurisdiction, except in case of fraud—would hardly set aside such a judgment in order to let one of the parties make a claim inconsistent with it to the prejudice of third parties. In *Hammond v. Schofield*, [1891] 1 Q. B. 453, a case in which, after recovering judgment against one defendant by consent, there being no defence, the plaintiff, having received information that another person was a joint debtor in the transaction, applied, with the consent of the defendant, for an order setting aside the judgment and adding the other person as a defendant in the action ; but it was held that the consent of the defendant could not enable the plaintiff to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, and that there was consequently no jurisdiction to make the order. The case was a strong one in favour of the plaintiff, who had obtained the order from a district registrar on the consent of the defendant and had had it confirmed, with some hesitation, by a Judge at Chambers, and the alleged partner having been the solicitor for the defendant and having given the consent to the judgment which it was held irrevocably released him. Wills, J., rests his judgment upon the ground that as the effect of the judgment was to destroy the right of action against the co-contractor even though the plaintiff did not know when he signed judgment that he had a remedy against him : *King v. Hoare*, 13 M. & W. 494 ; and *Ken-*

Judgment.

Meredith, J.

Judgment. *dall v. Hamilton*, 4 App. Cas. 504: the consent of the defendant could not resuscitate it against a third person or create a new liability on his part; and that the Courts existed to enforce rights, not to take them away or increase liabilities; whilst Vaughan Williams, J., seems to base his conclusion on the ground that it is against public policy to allow finished litigation to be reopened, and that a co-contractor is entitled to insist on the application of the rule *interest reipublice ut sit finis litium*, where, as in such cases, its violation would cause him particular injury; and in *Odell v. Cormack*, 19 Q. B. D. 223, at p. 228, Hawkins, J., had previously said he was strongly disposed to think the judgment against one co-contractor would be an answer to proceedings against the other, though the judgment had been set aside by a Master's order on the defendant's consent.

These are certainly strong cases, and stronger expressions of opinion than I expected to find, but while confessing my inability to fully perceive the justice of them, must give effect to them if they are decisions in point in principle. These cases clearly come pretty near to the case in hand, though it is not a case of co-contractors, but the distinguishing facts upon which I rely are not based upon that difference, for, though this is not a case of co-contractors, it is a case in which there can be but one of two remedies: if the plaintiff hold the company to the unauthorized act of their general manager, he can have no claim against the defendants: see *Buckland v. Johnson*, 15 C. B. 145, per Maule, J., at p. 166, and *The Bellocairn*, 10 P. D. 161, at p. 166. These distinguishing facts are such as, in my judgment, would save the plaintiff if the case were one of a claim against co-contractors. The ground upon which, in my opinion, we can well sustain this judgment, is that the judgment against the company was, to say the least of it, an irregular judgment, and was not got rid of by consent, but rightly set aside because irregularly entered, and so when set aside can properly be treated for the purposes of this action as if it had never existed, which disposes in

the plaintiff's favour of the two points: (1) that the judgment extinguished the right of action either directly or by once suspending it, and (2) that the plaintiff had no cause of action when writ issued because the judgment then existed. Judgment.
Meredith, J.

I am glad to be able to find expressions in the judgment of each of the two Judges who decided the case of *Hammond v. Schofield*, which seem to me to strongly support the view that this case is distinguishable from that case and the other cases before referred to, and that the plaintiff is not in this case concluded by the judgment in the action against the company. At page 455, Wills, J., is reported to have said: "If the judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as if it had never existed," words quite covering this case. It was certainly improper to have signed judgment without the leave of the Court required by section 16 of "The Winding-up Act." It ought never to have been signed, and, had the officer's attention been called to the facts, there can be no doubt it never would have been signed, for no good reason could be advanced why leave should be given if applied for. Then the learned Judge continuing, is reported to have said: "I am inclined to think (though not necessary to decide the question) that if it be regularly obtained, but through a slip on the part of the defendant, so that on an affidavit of merits it might be set aside, and it ultimately turns out that the defendant was never liable, it may equally be regarded as a judgment which never ought to have been signed, and would in such a case be treated as a nullity,"—again coming near the case in hand, even if the judgment had been regularly instead of irregularly signed, for here the plaintiff could not have judgment against both the company and the defendants. If he elected to take judgment against the persons really liable to him for the value of the goods, he would, of course, be obliged to give up any claim against the company, which, in point of law only, was liable. Then follow these words: "If,

Judgment. being regularly obtained, though through a slip on the part of the defendant, and set aside upon an affidavit of merits, it ultimately turns out that the original defendant was liable, I do not think it could be treated, so far as the rights of other persons are concerned, as a nullity. Still less, when there is no pretence for saying that there is any ground for setting it aside upon the merits as between the plaintiff and the defendant, and when as between them it could only be set aside by consent."

Meredith, J.

The reported observations of Vaughan Williams, J., at p. 458, are at variance with those of the other Judge on the subject of the effect of setting aside on the merits a judgment regularly entered. They are in these words: "Now it seems to me that it cannot be that a co-contractor has any such right of hearing when it is sought to set aside the judgment on the merits, and it seems also clear that it would be a good replication to a plea of the judgment recovered that the judgment in question had been reversed or set aside."

Then what was done in the way of proving a claim in the winding-up proceedings, without a knowledge of the facts, cannot stand in the plaintiff's way here; he having abandoned, as he must, the moment he seeks to recover against these defendants, all claim against the company: see *Curtis v. Williamson*, L. R. 10 Q. B. 57.

I am therefore of opinion, upon the whole case, that the judgment, directed to be entered in favour of the plaintiff for the value of the goods ordered and delivered after the defendants took over the works, is right, and, accordingly, would dismiss this motion with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

BRABANT V. LALONDE ET AL.

Will—Construction—“Nearest of Kin”—Period of Ascertainment—Tenants in Common—“Then”—Dower—Election.

In the absence of any controlling context, the persons entitled under the description “nearest of kin” in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue “then in that case” it should be equally divided between his “nearest of kin;” and the daughter died while still an infant and unmarried:—

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of the “nearest of kin;” and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common:—

Bullock v. Downes, 9 H. L. C. 1; *Mortimore v. Mortimore*, 4 App. Cas. 448; and *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, followed:—

The word “then,” introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression “in that case,” which followed it, and did not affect the construction of the will.

The widow remained in possession after the death of the testator, with her infant daughter, whom she supported out of the rents, until an order was made under R. S. O. ch. 137 permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant:—

Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was therefore entitled to dower out of the farm in addition to the one-third in fee simple.

ISRAEL LALONDE died at the township of Caledonia on the 2nd May, 1881, leaving surviving him his widow, Odile Lalonde, and one child, Rebecca Lalonde, then about nine months old, and also his father and mother and eight brothers and sisters. Statement.

His will was dated the 24th April, 1881, and was in the following words:—“I give, bequeath, and devise unto my dearly beloved child Rebecca Lalonde all my real and personal property and estate, consisting of the east half of lot number sixteen in the seventh concession of the township of Caledonia, in the county of Prescott, containing one hundred acres, more or less, together with all my personal

Statement. property, to have and to hold the same for her, her heirs and assigns forever ; provided, however, that she shall not have any control over the same till at her marriage or when she becomes of age. I give, bequeath, and devise unto my dearly beloved wife Odile Lalonde the full use and enjoyment of my said real and personal property until my said daughter shall become of age or shall marry ; provided, also, that if my said wife Odile Lalonde should again marry before the majority of my said child Rebecca Lalonde, then she shall forfeit all right to enjoy the use of my said real and personal property. In the event of my said daughter Rebecca Lalonde dying without leaving issue, then in that case all of my said property shall be equally divided between my *nearest of kin*, but with the condition that my said wife shall have and hold the same during her lifetime, or, as before provided, till she marry again. And for carrying into effect this my last will and testament I do hereby appoint my father Jean Baptiste Lalonde and my brother Elie Lalonde my executors, and whom I entreat to accept this charge."

At the time of his death the testator was owner in fee of the parcel of land mentioned in his will and of personal property to the amount of about \$650. His debts amounted in all to about \$450.

The will was never proved. The widow continued to live on the farm mentioned in it with her infant daughter Rebecca until the 13th February, 1888, when she married one Brabant. She took possession of the personal property and paid the debts of the testator, and with the balance supported herself and her child.

On the 1st April, 1889, upon the petition of the infant Rebecca, an order was made under R. S. O. ch. 137, secs. 3 to 9 inclusive, empowering the widow to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant. She continued to act under this order until 1st February, 1894, when the infant died unmarried, being then about fourteen years of age.

Letters of administration of the estate of the infant Statement.
were granted to the widow by the proper Surrogate Court.

The widow brought this action claiming to be entitled to a share of the property of her first husband as the mother and heiress-at-law of Rebecca, her deceased daughter, and claiming, in any event, to be entitled to dower in the lands left by her deceased husband. The father and mother and the brothers and sisters still surviving of the testator, Israel Lalonde, and the children of those of them who were deceased, were made defendants.

The defendants Jean Baptiste Lalonde and Odile Lalonde, the father and mother of the testator, claimed to be entitled to the farm and to an account against the plaintiff of the personal estate and of the rents and profits of the real estate of the deceased. The other adult defendants disclaimed all interest in the property, and asked for their costs. The infant defendants submitted their rights to the Court.

The plaintiff in her reply admitted her liability to account for the personal estate, and for the rents received since the death of Rebecca Lalonde, her daughter.

The action was tried before STREET, J., without a jury at L'Original on the 5th March, 1895.

Proof was made at the trial of the execution of the will and of the formal facts.

Colin G. O'Brian, for the plaintiff.

N. A. Belcourt, for the defendants Jean Baptiste Lalonde and Odile Lalonde.

John Maxwell, for the infant defendants.

March 18, 1895. STREET, J.:—

In the events which have happened since the death of the testator, the ultimate limitation in his will in favour of his "nearest of kin" has become effectual, and the present action is brought to determine who are entitled under that

Judgment. description. In the absence of any controlling context, the
Street, J. persons entitled under such a description are the nearest blood relations of the *propositus* at the time of his death, in an ascending and descending line: *Withy v. Mangles*, 10 Cl. & F. 215; *Halton v. Foster*, L. R. 3 Ch. 505; *Bullock v. Downes*, 9 H. L. C. 1; *Cusack v. Rood*, 21 W. R. 391.

Under that rule the persons entitled here were Rebecca Lalonde, the daughter of the deceased, and Jean Baptiste Lalonde and Odile Lalonde, his father and mother.

It is contended that an intention is to be gathered from the provisions of the present will to exclude Rebecca Lalonde from taking as one of the "nearest of kin," because the persons intended by that description only take in defeasance of the fee simple given to her alone in the first instance. It is urged that the testator cannot have intended first to give her a fee simple in the whole as his devisee, and then in defeasance of that estate to give her a fee simple in a third as one of his nearest of kin. Similar arguments have, when coupled perhaps with other circumstances not occurring here, been permitted to prevail where *the only person* who could take under the ultimate limitation to the "next of kin," or "heirs," or "relations" of the testator, happened also to be *the person* to whom the estate was devised until the ultimate limitation took effect: *Doe d. King v. Frost*, 3 B. & Ald. 546; *Jones v. Colbeck*, 6 Rev. Rep. 207; *Lees v. Massey*, 3 D. F. & J. 113; *Thompson v. Smith*, 25 O. R. 652.

But even this has not been always held sufficient to take the case out of the general rule: *Urquhart v. Urquhart*, 13 Sim. 613; *Gorbell v. Davison*, 18 Beav. 556.

The authorities were, however, all brought into line in England in *Bullock v. Downes*, 9 H. L. C. 1, followed by *Mortimore v. Mortimore*, 4 App. Cas. 448, and by the English Court of Appeal in *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, in which judgment was given during the month of January in the present year. These authorities leave no question open in the present case, and oblige me to hold that the persons to take under the will in question here

are those answering the description of nearest of kin at the death of the testator, viz., his daughter Rebecca and his father and mother.

Judgment.

Street, J.

The word "then," introducing the ultimate devise to the nearest of kin, is, I think, clearly not intended to be used as an adverb of time, but merely as the equivalent to the expression "in that case," which follows it, and therefore does not affect the construction of the will.

The plaintiff, in addition to her claim as heiress-at-law of the share of her daughter Rebecca, claims dower in the whole of the land.

The defendants Jean Baptiste Lalonde and Odile Lalonde set up an election by the plaintiff to take under the will. I am of opinion that she is put to her election by the terms of the will, but there is no evidence that she made her election. It is true that she appears to have remained in possession after the death of the testator with her infant daughter, but she was the natural guardian of the infant, who would have been entitled to the land as heiress-at-law, if not as devisee, in the event of the widow electing against the will, and the widow appears to have supported her out of the rents of the land down to the time of the making of the order permitting her to lease. In that order the claim of the widow as dowress is shewn to have been made and to have been allowed by the Court. Under these circumstances, I am unable to declare that the plaintiff has elected to take under the will, and she must therefore be declared entitled to her dower in the land.

Subject to her dower, the land must be declared to belong to the plaintiff, as heiress-at-law of her deceased daughter Rebecca, and to Jean Baptiste Lalonde and Odile Lalonde, each of them being entitled to an undivided one-third in fee simple as tenant in common with the others.

Should the widow desire it, the judgment will direct that her dower be set apart. She should pay to each of the two defendants last mentioned, an occupation rent for their shares of the land since the death of Rebecca, which

Judgment. rent I fix at \$80 a year for the whole farm. Those defen-
Street, J. dants are not entitled to an account of the dealings of the
 plaintiff with the personal estate of the testator, because
 his will has not been proved. This is probably fortunate
 for all parties, as the expense of taking such an account
 would probably be out of all proportion to any results to
 be obtained from it.

I can see no proper reason for making the brothers and sisters and the children of deceased brothers and sisters of the testator parties to the action; as to them the action must be dismissed with costs. As to the other parties, as the action was properly brought for a construction of the will, and the expense has not been increased by the contention of the defendants, and there is no estate out of which the costs can be paid except the farm, which they take between them, there will be no order as to costs.

**Divisional
Court.**

On the 22nd May, 1895, an appeal by the defendants Jean Baptiste and Odile Lalonde from this judgment was argued before a Divisional Court composed of ROSE and FALCONBRIDGE, JJ., and was dismissed with costs, the Court entirely agreeing with and adopting the opinion and judgment of STREET, J.

Shepley, Q. C., for the appellants.

J. B. O'Brian, for the plaintiff.

E. B. B.

[QUEEN'S BENCH DIVISION.]

THIBAudeau ET AL. V. PAUL ET AL.

Bills of Sale and Chattel Mortgages—Book Debts—Transfer of—Rights of Assignee under Act—Priority—R. S. O. ch. 125—55 Vict. ch. 26 (O.).

Book debts are not within the Chattel Mortgage Act, R. S. O. ch. 125, and amending Act, 55 Vict. ch. 26, and a transfer of them does not require registration.

The latter Act is not retrospective, and does not affect an agreement for future supplies of goods entered into prior to its passing.

An assignee for creditors under R. S. O. ch. 124, and amendments is not in the position of a purchaser for value without notice, and takes no higher rights under the assignment than his assignor had.

Where, therefore, certain book debtors were notified by the assignee for creditors under the Act, of the assignment to him, before notification by certain creditors to whom such debts had been previously assigned, it was held that he did not gain priority thereby.

Decision of BOYD, C., affirmed.

THIS was an appeal against a judgment of BOYD, C., in Statement.
an action by Thibaudeau Bros. & Co., on behalf of themselves and other creditors, and W. A. Campbell, Assignee of Alexander Paul against the said Paul and the firm of Knox, Morgan & Co.

Knox, Morgan & Co. had, by an agreement in writing, dated February 28th, 1891, sold a certain business stock-in-trade and book debts to Paul, in which agreement it was stipulated that they would keep him supplied with goods for sale in the said business, and he was to keep making payments to them, but the property in the goods was not to pass until they were paid for.

After the business had been carried on in that manner for some time, Paul, by a further instrument in writing, dated December 20th, 1892, assigned all his book debts to Knox, Morgan & Co. Neither of these instruments was filed or registered under the Bills of Sale Act.

Paul became embarrassed in business, and on the same day that he made an assignment for the benefit of his creditors, Knox, Morgan & Co., before they became aware of such assignment, took possession of the stock-in-trade and business, and claimed to hold the same and the book debts against the assignee and creditors by virtue of said two instruments.

Statement. The action was tried at Toronto on October 26th and 27th, and December 15th, 1894, before BOYD, C., without a jury.

Clute, Q. C., and J. A. Mills, for the plaintiffs.

Moss, Q. C., and W. F. Walker, Q. C., for the defendants
Knox, Morgan & Co.

December 17, 1894. BOYD, C.:—

“Book debts” were not such personal chattels or property as were within the original Chattel Mortgage and Sale Act, R. S. O. ch. 125, and the language of the amending Act now in question, 55 Vict. ch. 26 (O.), is not explicit enough to induce the conclusion that it was intended to widen the law as to the character of the chattel property being dealt with. The scope of the amending Act appears to be as to goods and chattels to be afterwards acquired, *i.e.*, future property akin to existing goods and chattels to which the first Act applied. *Kitching v. Hicks*, 6 O. R. 739, was an express decision as to book debts being outside of the Act, and so they remain under the amending Act.

In the result, then, the second agreement as to book debts of 20th December, 1892, though subsequent to the amending Act of 14th April, 1892, is not affected by it, and the prior agreement as to the goods, present and future, made upon the sale of the stock-in-trade by Knox, Morgan & Co. to Paul, of 28th February, 1891, is not within the purview of the Chattel Mortgage Act and stands independently of the late Act as a prior transaction. Manifestly it could not be registered under the Revised Statute after the enactment of the amending Act within the time-limit fixed by the Revised Statute, and that goes to shew that the amending law does not interfere with prior and pending agreements which must run their course under the old law.

The case generally as to law and facts falls within

Banks v. Robinson, 15 O. R. 618, for here it is, I think, sufficiently proved that possession was taken by the defendants Knox, Morgan & Co., before the assignment for creditors. The injunction which was obtained *ex parte* did not interfere with the change of possession or forbid it, and it does not appear to be an essential matter to consider. I do not deal with the rights of one creditor, Doull, Gibson & Co. as against Knox, Morgan & Co., but it does not seem possible to litigate that claim upon an action framed as this is, and the judgment here will be without prejudice to that right of suit.

Judgment.

Boyd, C.

The Act of 1892, 55 Vict. ch. 26, sec. 2 (O.), does not give the plaintiff suing as representative creditor the same status as execution creditors for all purposes, but only as a basis for attack upon instruments which, from lack of form or substance, are not protected by registration under R. S. O. ch. 125.

The objection, much argued, as to the vague character of the first instrument which prevented its being operative is fully met by the case of *Tailby v. The Official Receiver*, 13 App. Cas. 523, overruling the decisions relied on by the plaintiff.

The action appears to fail on all grounds argued, and the judgment must go for the defendants, other than Paul, with costs.

Against this judgment the plaintiffs moved by way of appeal to the Divisional Court and the motion was argued on February 11, 1895, before ARMOUR, C. J., and FALCONBRIDGE, J.

Clute, Q.C., and *J. A. Mills*, for the appeal. The written instruments were kept secret and cannot prevail against creditors. The secrecy was a fraud on the creditors: *McAllister v. Forsyth*, 12 S. C. R. 1, *per* Henry, J., at p. 24. Even if the first agreement was good as to goods then delivered it was not as to all goods delivered after April 14th, 1892, 55 Vict. ch. 26, sec. 5 (O). The evidence shews that

Argument. the assignee had possession here, and if he had before Knox, Morgan & Co.'s equitable title was perfected by possession, the assignee has priority. *Banks v. Robinson*, 15 O. R. 618, is relied upon, but that case cannot be said to be settled law, and has never been followed yet. Mere demand of possession is not sufficient to perfect equitable title: *Anaconda v. Rogers*, 1 Ex. D. 285. The book debts were never taken possession of by Knox, Morgan & Co., but were by the assignee, who notified all the debtors. We refer to *Joseph v. Lyons*, 15 Q. B. D. 280; *Hallas v. Robinson*, *Ib.* 288; *Clements v. Matthews*, 11 Q. B. D. at p. 814.

Moss, Q. C., and *W. F. Walker*, Q. C., contra. Knox, Morgan & Co., had the right to sell the goods on any terms. At the time of the first agreement the transaction was not within the Bills of Sale Act, and the amendment. 55 Vict. ch. 27 (O.), did not apply, because it was not retrospective. Even if possession was material the trial Judge has found that in favour of Knox, Morgan & Co. *Banks v. Robinson*, 15 O. R. 618, is directly in point in favour of Knox, Morgan & Co., and that decision has been recognized in *Willbanks v. Heney*, 19 O. R. 549. No notice by the assignee could give him priority over Knox, Morgan & Co. as to the book debts.

Clute, Q. C., in reply. On the broad ground of fraud this transaction should not be allowed to stand.

March 2, 1895. ARMOUR, C. J. :—

The judgment of the learned Chancellor is in my opinion right, and must be affirmed. The Act 55 Vict. ch. 26 (O.), cannot be held to have a retrospective operation, so as to avoid the agreement of the 28th February, 1891, for the rule is that "Unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective": *per* Lord O'Hagan in

Gardner v. Lucas, 3 App. Cas. at p. 601. See also *Reid v. Judgment. Reid*, 31 Ch. D. at p. 408; *The Queen v. Guardians of Armour, C.J. Ipswich Union*, 2 Q. B. D. 269; *Hickson v. Darlow*, 23 Ch. D. 690. It is impossible for us to hold in the face of decided cases by which we are bound, that the agreement of the 28th February, 1891, was fraudulent and void as against the plaintiffs, and we think that if it were necessary that possession should have been taken as against the assignee by Knox, Morgan & Co. of the after acquired goods, it was sufficiently taken by them of such goods to perfect their title before possession was taken by the assignee and before the assignment.

The learned Chancellor found that such possession was so taken, and we think that the evidence supports his finding.

The book debts were clearly not goods and chattels within the meaning of R. S. O. ch. 125, nor within 55 Vict. ch. 26 (O.): *Kitching v. Hicks*, 6 O.R. 739. But it was contended that because the assignee had notified the book debtors to pay their debts to him he thereby acquired the right to the book debts as against Knox, Morgan & Co., and their rights to them under the agreement of the 20th December, 1892, they not having notified such book debtors to pay their debts to them, and this contention would prevail if the assignee is to be treated as a purchaser for value without notice.

But notwithstanding what is said by the dissenting Judge in *McAllister v. Forsyth*, 12 S. C. R. 1, for whose opinion I have a profound respect, I do not think that an assignee under R. S. O. ch. 124, can be looked upon as a purchaser for value, but as one taking the place of the assignor, and taking the property assigned to him with all the burthens and equities to which it was subject in the hands of the assignor.

In *Ex p. Harrison, In re Cannock and Rudgeley Colliery Co.*, 28 Ch. D. 363, Earl of Selborne, L. C., said at p. 368: "Furthermore, it is well settled law that, subject to certain particular provisions of the law of bankruptcy,

Judgment. such as those with regard to reputed ownership, the
Armour, C.J. trustee in bankruptcy stands in the shoes of the bankrupt
as against other persons having preferable titles to that
of the bankrupt."

In *Ex p. Robert Stewart*, 4 D. J. & S. 543, the Lord Chancellor at p. 546 said: "It is a general rule that an assignee takes the property of a bankrupt subject to the equities which affect it in his hands; and, therefore, as a general rule, he will take it subject to the effect of any contract for valuable consideration entered into before the bankruptcy." See also *In re Mapleback, Ex p. Caldecott*, 4 Ch. D. 150; *Mitford v. Mitford*, 9 Ves. 87; *Ex p. Holthausen In re Scheibler*, L. R. 9 Ch. 722. So also the assignee in insolvency under 7 Geo. IV. ch. 57, was held to stand in the place of the insolvent and to take only such interest as he could give, and subject to all equities by which the insolvent was bound: *In re Agnes Atkinson*, 2 D. M. & G. 140.

In *In re Barr's Trusts*, 4 K. & J. 219, a distinction was attempted to be drawn between an assignee in insolvency where the assignment is voluntary and a trustee in bankruptcy where the proceedings are *in invitum*, but the Vice-Chancellor, Sir W. Page Wood, said at p. 231: "And, as to the argument which was advanced on behalf of the present assignees, that in insolvency the assignment is voluntary, whereas in bankruptcy the proceedings are *in invitum*, I cannot for a moment attach any weight to that distinction."

The Act R. S. O. ch. 124, does not profess to give the assignee under it any greater or higher rights than the assignor himself had and the assignee under it takes such rights subject to all the equities to which they were subject in the hands of his assignor.

And an assignee under this Act for the general benefit of creditors does not like a particular assignee for a specific consideration become a purchaser for value, and in this respect resembles an assignee in insolvency or in bankruptcy who does not become a purchaser for value: *Mitford v. Mitford*, 9 Ves. 87.

In my opinion, therefore, the assignee in this case took the book debts in question subject to the equitable right of Knox, Morgan & Co., to them under the agreement of 20th December, 1892, and gained no greater right to them than his assignor Paul had, nor did his notifying the book debtors to pay their debts to him give him any greater right to them against Knox, Morgan & Co., than if Paul, his assignor, had done the same thing and had claimed on account of doing so the right to the book debts as against Knox, Morgan & Co.

The motion will, therefore, be dismissed with costs.]

FALCONBRIDGE, J., concurred.

G. A. B.

[QUEEN'S BENCH DIVISION.]

McVICAR

v.

THE CORPORATION OF THE TOWN OF PORT ARTHUR.

Municipal Corporations—Public Parks Act—Purchase Money for Lands Taken—Liability for—Agency of Board for Corporation—R. S. O. ch. 190.

Where a municipality adopts the "Public Parks Act," R. S. O. ch. 190, and proceedings are regularly taken thereunder for the formation of the board of park management and for the doing of the various matters authorized to be done thereby, including the purchase by the board of lands needful for park purposes, such board becomes the statutory agent of the municipality for such purchase, and the municipality and not the board is liable to pay for the lands. The purchase money may be raised by a special issue of debentures under sec. 17, sub-sec. 4 of the Act, or may be paid out of the general funds of the municipality, which is liable to pay whether the debentures specially issued have been sold or not.

Decision of ROBERTSON, J., reversed.

THIS was an appeal from a judgment of Robertson, J., in an action brought to recover the amount of an order dated 12th January, 1893, in favour of the plaintiff, given by the board of park management of the town of

Statement. Port Arthur on the town treasurer for the sum of \$1,254 in payment for lands required and taken from plaintiff for park purposes by the board.

The defences set up by the corporation that are material were : That any contract that was made was made with the board of park management which had no power to bind the corporation ; that no proceeds of any debentures were ever placed to the credit of the park fund, and that the corporation had no moneys applicable to the payment of such purchase money ; that they never were in a position to raise such moneys without exceeding their statutory powers ; that section 17 of the Public Parks Act, R. S. O. ch. 190, was a bar to the plaintiff's action ; that the plaintiff should have arbitrated under the Municipal Act ; that the defendants were not bound by by-law or contract under seal, and they also set up section 4 of the Statute of Frauds.

The action was tried at Port Arthur on June 15, 1894, before ROBERTSON, J., without a jury.

Lount, Q. C., and F. H. Keefer, for the plaintiff.
A. S. Wink, and John Reeve, for the defendants.

The defendant corporation on 3rd September, 1888, by by-law with the assent of the electors adopted the Public Parks Act, and subsequently by another by-law provided for the appointment of the park board, with all rights and privileges under the Public Parks Act: the park board was then organized, and the corporation requested to levy a rate for park purposes, and were notified how orders on them by the board for money would be signed. An arbitrator for the board was appointed, which appointment the corporation ratified by by-law as well as that of a subsequent arbitrator appointed in place of the first. Lands were located and expropriated by the board: plans were registered, and owners of lands (among them the plaintiff) were bargained with. A by-law was then passed authorizing the mayor to borrow money for the use of the park board

upon the credit of the park fund rate, and for the issue of debentures, and the solicitor of the board was instructed to obtain a deed of the plaintiff's lands to the corporation and have it deposited in a bank, which he did, the plaintiff being given an order on the town treasurer for the price agreed upon (\$1,254), of which the corporation were notified. The corporation then passed a by-law appointing a committee for the purpose of borrowing money on the security of the debentures and authorizing such committee to borrow pending the sale of the park debentures, and to seal with the corporation seal a note for the amount borrowed, and a letter was written by the town clerk to the secretary of the park board promising to furnish the board with funds for the purchase of lands. The report of the finance committee of the defendant corporation recommending that the amount of cash asked for by the board be placed to the credit of the park fund in the town treasurer's hands was duly adopted and confirmed by the corporation. Subsequently the park fund rate was levied for the years 1891, 1892 and 1893, the rate for 1891 being levied before the by-law was passed and the plaintiff's land purchased had been exempted from taxation for the years 1893 and 1894 as belonging to the corporation. In 1894 the board decided to abandon the proposed project of purchasing park lands. Statement.

One owner of land taken for the park project was paid, for his lands so taken, partly with a park fund debenture and the balance in cash. The debentures bore five per cent. interest and could not be sold at par and were never sold, although efforts were made to sell them.

At the close of the plaintiff's case the learned Judge gave the following judgment.

ROBERTSON, J.—I hold a very strong opinion in this case that the plaintiff's action must be dismissed.

In the first place there is a permissive power given to the board to purchase lands for park purposes, and the persons who sell these lands know the purpose for which they are selling.

Judgment. The statute provides for the raising of funds required Robertson, J. for the purchase of lands by the levying of a rate or the issue of "Park Fund Debentures," and until these debentures are issued and money raised thereon, there is no fund created to be drawn upon for the purchase of the lands; consequently, until such fund is provided a purchase or sale of lands is premature, there being no money available for their payment. That is my view of the meaning of the statute.

In this case the plaintiff has agreed to sell her lands, in fact has sold and conveyed them, and no doubt in perfect good faith, but she should have taken care to have ascertained from the parties to whom she was selling that there were funds available to pay her purchase money.

The statute—I am speaking of "The Public Parks Act," R. S. O. ch. 190, to my mind contemplates that until such a fund is created the park board has no power to purchase lands for park purposes at all.

By section 17 it provides that (1) "The board shall, in the month of March in every year, make up, or cause to be made up an estimate of the sums required during the ensuing financial year, for :

"(a) The interest of any money borrowed as herein mentioned.

"(b) The amount of the sinking fund ; and

"(c) The expense of maintaining, improving and managing the parks, boulevards, avenues and streets under their control.

"(2) The board shall report their estimate to the council not later than the first day of April in each year.

"(3) The council shall, in addition to all other rates and assessments for municipal purposes, levy and assess in every year a special annual rate sufficient to furnish the amount estimated by the board to be required for the year, but not exceeding one-half mill in the dollar upon the assessed value of all the ratable, real and personal property ; such fund to be called "The Park Fund Rate." The said rate shall be deemed to be included in the limit.

of two cents on the dollar authorized by *The Municipal Act* in that behalf exclusive of school rates." Judgment.

Robertson, J.

That is for the annual expenditure after the park system is established.

Then "(4) The council may also, subject as hereinafter provided, on the requisition of the board, raise by a special issue of debentures of the municipality, to be termed 'Park Fund Debentures,' the sums required for the purpose of purchasing the lands and privileges reported necessary for park purposes."

Now, if any corporation is liable, in my judgment, for specific performance of this transaction, it is the board of park management. There is no contract whatever made with the corporation of the town. The town, on the requisition of the board, is obliged to raise the necessary funds, and may raise the fund by debentures for the purpose of purchasing the lands.

They have done here all they can. It appears, however, to be impossible to raise the amount required by the sale of debentures. They have passed a by-law, they have got debentures, but they cannot sell these debentures. The consequence is, they are not able to place anything to the credit of the park board fund. Therefore, the park board cannot carry out the agreement to purchase the lands.

I may be wrong in my opinion, but that is my view. The question in my judgment is an important one, and I think the parties ought to have an opportunity of going to a higher Court if they are so advised, and in order to enable them to do so, I will stay all proceedings until the next sittings of the Divisional Court, but dismiss the action with costs.

The plaintiff moved to set aside this judgment, and asked for an order directing one in favour of herself, or for an order directing the delivery to the plaintiff of park fund debentures, or for a new trial on the grounds that the board had expropriated the land and given an

Statement. order for the payment of the purchase money, and the defendant corporation had ratified the purchase, and so were estopped from denying its liability, and that the evidence shewed that they could have raised the money if they had so desired.

The motion was argued in the Divisional Court on February 13th, 1895, before ARMOUR, C. J., and FALCONBRIDGE, J.

Aylesworth, Q.C., for the motion. All the preliminaries to entitle the plaintiff to her money have been properly complied with. The by-law adopting the Public Parks Act, was properly passed by the defendants. The plaintiff's land has been taken from her without her consent by the park board under their statutory powers. Her land has been conveyed to the defendants. A rate has been levied. The defendants have passed a by-law to issue the debentures and raise the money, which by-law is still in force. The plaintiff has not been paid, although other land owned by her has been taxed for the purpose, and she has paid her share of the levied rate which the defendants have not applied to the purpose for which it was levied. The excuse given is that the debentures could not be sold at par as provided by the Act, because the rate of interest on them was only five per cent. They could have been sold if the rate had been made six per cent. But even that is no excuse, otherwise the defendants could escape at any time from such a liability by making the interest rate low. The corporation has adopted the whole matter, and directed the treasurer to pay the plaintiff's order. The plaintiff is really in Court suing on the defendants' cheque.

A. S. Wink and Dyce Saunders, contra. The defendants have not sold the debentures and until they do, they have no funds applicable to the plaintiff's claim. They were obliged to put the rate of interest at five per cent. (which made the debentures unsaleable) for the reason that if they

made the rate higher they would have exceeded the statutory rate limit of two cents on the dollar. There was no by-law for the purchase, and a resolution is not sufficient, 55 Vict. ch. 184, sec. 282 (O.): *The Waterous Engine Works Co. v. The Corporation of the Town of Palmerston*, 21 S. C. R. 556; *Regina v. Zoeger*, 1 P. R. 219. The duty of the park board before purchasing is to report their required estimate to the council: R. S. O. ch. 190, sec. 17, sub-sec. 2. The money must be received by the town treasurer, sub-section 10. The effect of the Act is to raise a fund for park purposes, and until it is raised it cannot be drawn upon. There is no evidence of any fund having been raised. The land should not have been purchased until the fund to pay for it had been provided, and there is no liability on the defendants to pay the plaintiff. The evidence shews that the plaintiff was offered park fund debentures in payment and declined to accept them. There was no acceptance of the order by the defendants, and even if there was it should be under seal: *Munson v. Municipality of Collingwood*, 9 C. P. 497; *Smith v. The Corporation of the Village of Collingwood*, 19 U. C. R. 259. See also Dillon on Corporations, 4th ed., par. 505.

Aylesworth, Q. C., in reply. There is no evidence that a six per cent. rate of interest would cause the general rate to exceed two cents on the dollar. Even if it did the corporation must cease contracting further debt but must pay past debts.

March 3, 1895. ARMOUR, C. J. :—

By "The Public Parks Act," R. S. O. ch. 190, sec. 2, provision is made for the establishment of a park or a system of parks in any city or town, and that the council of any city or town may adopt the Act by a by-law duly made and passed by the council of such city or town with the assent of the electors qualified to vote at municipal elections, given before the final passing thereof as provided by the municipal law.

Judgment. By section 4 provision is made in case of the adoption of the Act for the general management and control of such park or system of parks acquired and established under the provisions of the Act to be vested in and exercised by a board to be called "The Board of Park Management."

By section 5 it is provided that the board shall be a body politic and corporate, and shall be composed of the mayor of the city or town, and of six other persons who shall be residents of the city or town but not members of the council, and shall be appointed by the council on the nomination of the mayor.

By section 13 (1) it is provided that the board shall have power and authority to select and acquire by purchase or otherwise, or to lease the lands, rights and privileges needful for park purposes :

(3) The title of all lands purchased shall be taken to the city or town.

By sections 14, 15 and 16 provision is made for the expropriation of such lands as may be required by the board for park purposes, and for arbitration in case of disagreement as to the price to be paid therefor, and for the application of the provisions of the Municipal Act as to arbitrations thereto.

By section 17 (1) it is provided that the board shall, in the month of March in every year make up, or cause to be made up, an estimate of the sums required during the ensuing financial year, for .

(a) The interest of any money borrowed as hereinafter mentioned.

(b) The amount of the sinking fund, and

(c) The expense of maintaining, improving and managing the parks, boulevards, avenues and streets under their control.

(2) The board shall report their estimate to the council not later than the 1st day of April in each year.

(3) The council shall, in addition to all other rates and assessments for municipal purposes, levy and assess

in every year a special annual rate sufficient to furnish ^{Judgment.} the amount estimated by the board to be required for ^{Armour, C. J.} the year, but not exceeding one half-mill in the dollar upon the assessed value of all ratable, real and personal property; such rate to be called "The Park Fund Rate." The said rate shall be deemed to be included in the limit of two cents on the dollar authorized by *The Municipal Act* in that behalf exclusive of school rates.

(4) The council may also, subject as hereinafter provided, on the requisition of the board, raise by a special issue of debentures of the municipality, to be termed, "Park Fund Debentures," the sums required for the purpose of purchasing the lands and privileges reported necessary for park purposes.

(5) It shall not be necessary to submit to the electors a by-law authorizing the issue of debentures in case the annual sum required to meet the annual interest and sinking fund does not, with a reasonable allowance for annual expenses of managing, improving and maintaining the parks, and other works under the control of the board, exceed the limit of half a mill in the dollar, any provisions in the Municipal and Assessment Acts, or any special or private Acts relating to the city or town, to the contrary notwithstanding.

(6) The debentures may run for such period as the council thinks fit, not to exceed forty years from the dates thereof, and shall be in such sums as the council sees fit, and bear interest not to exceed six per centum per annum, payable half-yearly, and shall not be sold below par. They shall be issued, and a record kept of the same, as is provided with respect to other city or town debentures.

(7) Debentures issued by virtue of this Act, shall form a lien and charge upon all lands which are by this Act declared to be subject to the control and management of the board.

(8) In case of a sale, the board may sell free from the said lien, but the purchase money shall be applied to the

Judgment. payment of park debentures, or to the purchase of other
Armour, C.J. lands for park purposes.

(9) During the currency of the debentures the council shall withhold and retain, as a first charge on the annual rate the amount required to meet the annual interest of the debentures, and the annual sinking fund to be provided for the retirement thereof as the debentures become due; such sinking fund to be invested and dealt with, as in the case of other municipal debentures.

(10) All moneys realized or payable under this Act shall be received by the treasurer of the municipality in the same manner as other funds, and by him deposited to the credit of the park fund, and shall be paid out by him on the orders of the board; save as to the amount required to meet the interest and provide a sinking fund for debentures.

The council of the defendant corporation duly made and passed a by-law with the assent of the electors qualified to vote at municipal elections given before the final passing thereof, as provided by the municipal law, adopting "The Public Parks Act," and the defendant corporation thereby gave in effect antecedent authority for the doing of everything authorized to be done by the provisions of that Act, including, of course, the purchase by the board of park management of the "lands, rights and privileges needful for park purposes." The effect of The Public Parks Act is to make the board of park management the statutory agents of the city or town for the purchase of the lands, rights and privileges needful for park purposes, and to take the title of all lands purchased to the city or town, and the necessary inference from the Act is that the city or town is to pay for the lands so purchased for it by their agents the board of park management.

The board of park management of the defendant corporation purchased the plaintiff's lands, and took the title thereof to the defendant corporation, and gave in due form to the plaintiff an order upon the treasurer of the defendant corporation for the amount of the purchase money, and this purchase money the defendant corporation by

necessary inference derived from the Public Parks Act was bound to pay. Judgment.
Armour, C.J.

The action of the board of park management in purchasing the plaintiff's land was amply ratified by the defendant corporation: see *Cheetham v. The Mayor, etc., of the City of Manchester*, L. R. 10 C.P. 249; and on the 9th of January, 1893, after notice had been given to the defendant corporation, of the granting of the order in favour of the plaintiff for the purchase money of the plaintiff's lands, the council of the defendant corporation, by resolution, adopted and confirmed the report of their Finance Committee "that the amount of cash asked for by the board of park management, \$7,333.58," which included the amount of the said order, "be placed to the credit of the park fund in the treasurer's hands."

No special provision is made by the Public Parks Act for the payment, by the city or town, of the purchase money of lands purchased by the board of park management for it out of any particular fund, but the council of the city or town may raise by a special issue of debentures under section 17 sub-section 4, the sums required for that purpose, but it is clear that the council is not compelled to adopt this course nor confined to it, but may pay such purchase money out of the general funds of the city or town.

It is said that the plaintiff's remedy is against the board of park management with which she dealt, but she has clearly no remedy against it, for it has performed its whole duty, has purchased her land, has taken the title to the defendant corporation and has granted to her an order upon the treasurer of the defendant corporation for the purchase money.

It is said further that the plaintiff has no remedy against the defendant corporation, and that unless it chooses to sell its park fund debentures and pay her she is without redress, but as was said in an ancient case, "where a man has *jus ad rem*, it would be absurd, ridiculous and a shame to the law if he could have no remedy,"

Judgment. and I think the plaintiff has a remedy against the defendant corporation.
Armour, C.J.

And I do not think that the plaintiff is concerned with the method to be adopted by the council of the defendant corporation in procuring the money with which to pay the purchase money of the land purchased from her by the board of park management; it is sufficient for her that the defendant corporation is bound to pay such purchase money; and I am therefore of the opinion that she is entitled to judgment for the amount of the said order with interest from the date thereof: *Guilder v. The Town of Otsego*, 20 Minn. 74.

But as, no doubt, the defendant corporation has refrained from raising the money necessary for the payment of the plaintiff's order in the belief that the plaintiff had no remedy against it for the amount of it, we think that a reasonable time ought to be afforded to it for that purpose, and we therefore direct that a peremptory writ of mandamus do issue returnable the first day of next Easter Sittings, commanding the defendant corporation to raise the money necessary for the payment of, and to pay the order of the plaintiff with interest thereon from the date thereof, and that the plaintiff's statement of claim be amended, asking in the alternative for such writ.

The defendant corporation will pay the costs of the litigation.

I refer to *The City of Philadelphia v. Field*, 58 Penn. Sta. 320; *The Commissioners of Jefferson County v. The People*, 5 Neb. (Brown) 127; *Nathan Pumphrey v. Mayor and City Council of Baltimore*, 47 Md. (Stockett) 146; *The People ex. rel. Park Commissioners of Detroit v. The Common Council of Detroit*, 28 Mich. (6 Post) 228; *Munson v. Municipality of Collingwood*, 9 C. P. 497; *Smith v. The Corporation of the Village of Collingwood*, 19 U. C. R. 259; *Lewis v. Pontypridd Caerphilly and Newport R. W. Co.*, 11 Times L. R. 203.

FALCONBRIDGE, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

COOK V. TATE.

Fences—Division Fences—Proper Mode of Construction—Trespass—Fence-Viewers—R. S. O. ch. 219, sec. 3—Toronto City By-law No. 2447.

The Line Fence Act, R. S. O. ch. 219, sec. 3, provides that "owners of occupied adjoining lands shall make, keep up, and repair a just proportion of the fence which marks the boundary between them":—

Held, per FERGUSON, J., affirming the decision of ARMOUR, C.J., that a boundary fence, under R. S. O. ch. 219, should be so placed that when completed the vertical centre of the board wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land :—

Held, per BOYD, C., contra, that if the boundary line be between the posts on one side of the fence, and the scantling and boards on the other, so that there is practical equality in the amount of space occupied by the posts and that occupied by the continuous boards, and if that method is sanctioned by local usage, neither owner has legal ground for complaint.

THIS was an action for damages for trespass and encroachment, brought by the owner of lot 186, on the west side of Euclid avenue, plan 726, against the owner of the adjoining lot, 185, the dispute between the parties turning mainly upon the position of a boundary fence. Statement.

For the purposes of this report the facts are sufficiently stated in the judgments.

The action was tried at Toronto, on September 27th, 1894, before ARMOUR, C. J.

Davis, for the plaintiff.

Nesbitt, for the defendant.

November 26th, 1894. ARMOUR, C. J. :—

I find that the line run by Speight & Van Nostrand, as and for the limit between the said lots, numbers one hundred and eighty-five and one hundred and eighty-six, was the true limit between the said lots.

I find that even if it were not the true limit the defendant having brought his action against the plaintiff, claiming it to be the true limit, and the plaintiff having submitted to such claim and settled the suit on the basis of such claim by buying three feet of the defendant's land in

Judgment. order to avoid the consequences of such claim and paying the costs of such action the defendant cannot be heard to allege that it was not the true limit.

Armour, C.J.

I find that according to such limit the defendant's shed and fence encroach upon the plaintiff's, and that he is entitled to have them removed by the defendant.

The plaintiff and defendant were each bound to erect and maintain one-half of the fence between the said lots: R. S. O. ch. 219; by-law of the city of Toronto, No. 2447.

And it was discussed at the trial how in case of an ordinary post and board fence the same should be placed with respect to the limit between the lots, and, in my view, if A. and B. own adjoining lands, each being bound to erect and maintain one-half of the fence between their lands, A., in building his half of the fence, should place the posts on his own land, in such a position that when the boards are put on, the vertical centre of the boards shall coincide with the limit between their lands, and that B. shall, in building his half, pursue the same course. Thus:

A.'s land.



B.'s land.

By this method neither A. nor B. can deprive the other of any land by the operation of the Statute of Limitations: *Newell v. Hill*, 2 Metc. 180.

As to the costs, the defendant commenced the litigation by bringing an action against the plaintiff for his encroachment of two inches upon the defendant's land and applying the injunction "all they that take the sword shall perish with the sword," I think the defendant must pay the costs. Judgment.
Armour, C.J.

There will, therefore, be judgment for the plaintiff with costs.

The defendant moved by way of appeal before the Divisional Court, consisting of BOYD, C., and FERGUSON, J., on January 10th, 1895.

Denton, for the defendant. The fence is not more on the plaintiff's land than the law allows of. The statute applies: R. S. O. ch. 219, sec. 3; *Newell v. Hill*, 2 Metc. 180.

Davis, for the plaintiff. R. S. O. ch. 184, sec. 489, subsec. 18, lays down the duties of parties as to division fences. I refer to *Hubbell v. Peck*, 15 Conn. 135; *Tyler's Law of Boundaries and Fences*, p. 351; *Vowles v. Miller*, 3 Taunt. 137. The line should run through the centre of the object forming the boundary.

March 2nd, 1895. BOYD, C.:—

The Line Fence Act, R. S. O. ch. 219, sec. 3, provides that "owners of occupied adjoining lands shall make, keep up and repair a just proportion of the fence which marks the boundary between them." These words imply that the fence may be placed partly on the land of each owner: *Warren v. Sabin*, 1 Lansing (N.Y.) 79. And it should be consistent with local custom and usage and fitness of situation placed as far as possible equally on the lands of each. As pointed out in *Newell v. Hill*, 2 Metc., at p. 184, when a ditch and an embankment, "made by the earth thrown from it, are used together as a fence, and the ditch is made on one side of the dividing line and the embankment on the other, each occupying about the same quantity

Judgment. of land, if justified by the same considerations of fitness
Boyd, C. and usage, must be considered reasonable and therefore legal." So here, if the line marking the boundary lies between the posts on one side and the scantling and boards on the other, so that there is practical equality in the amount of space occupied on the one hand by the isolated posts and on the other by the continuous boards, and if that method of structure is sanctioned by local usage (as is established here, the practice being to have all the posts on one side), then I see no reason for encouraging this kind of litigation. It appears to me that such a controversy as this involving merely "a matter of proportion," is, under the statute (ch. 219, secs. 4, 5, 7), and by-law 2447, under ch. 184, sec. 489 (18), for the fence viewers to determine. Any how, there appears to be no such dispute as to title as to induce the giving of costs on the scale of the High Court. I think the judgment should be reversed and the action dismissed.

FERGUSON, J.:—

I entirely agree in the finding of the learned Chief Justice, before whom the action was tried, that the line made by Speight & Van Nostrand as and for the limit between lots 185 and 186 was the true limit between these lots. I also agree in the opinion expressed by the learned Judge, that even if this were not the true limit, the defendant having brought his action against the plaintiff, claiming it to be the true limit, and the plaintiff having submitted and settled the action on the basis of such claim, and on the same basis, and to avoid the consequence of the claim, purchased three feet of the defendant's land, paying the costs of the defendant, he, the defendant, cannot be heard to say that it is not the true limit. I think the case *Crosswaite v. Gage*, 32 U. C. R. 196, strongly supports this view, and may be said to be an authority for it.

I also think that the finding that the defendant's shed and the fence built by the defendant encroach upon the

plaintiff's land is correct, though the encroachment of the shed is very small indeed. I have had difficulty, however, in arriving at a conclusion as to how the line fence, being of the kind that it is, should be placed with respect to the mathematical line between the lands of the parties respectively. This is a matter that seems not to have been provided for either by R. S. O. ch. 219 or by-law 2447, each of which is referred to by the learned Chief Justice. No precedent was referred to on the immediate subject. Judgment.
Ferguson, J.

The statute (section 3) provides that owners of occupied adjoining lands shall make, keep up and repair a just proportion of the fence which marks the boundary between them; and (section 4) that in case of a dispute between owners respecting "such proportion," the "following proceedings" may be adopted. By section 7 it is provided that the fence viewers shall make an award "respecting the matters so in dispute," which award shall specify the locality, quantity, description and lowest price of the fence it orders to be made; and that in making the award the fence viewers shall regard the nature of the fences in the locality.

The by-law on the subject of line fences above referred to provides that all division or line fences between lots in the city shall be made, kept up and maintained as lawful fences by the parties owning or occupying the lands immediately adjoining thereto and divided by such fences, each party maintaining an equal proportion of the same: (section 1).

By section 3 it provides (amongst other things) that whenever parties owning or occupying lands adjacent to each other shall not be able to agree in apportioning the cost of a lawful division fence between their lands, then and in such case the dispute shall be settled by the city commissioner and two arbitrators, who shall decide which part or proportion of such fence each party shall keep up and maintain, and by section 4 they are to apportion to each party his share of the fence to be kept up and maintained by him; and beyond these, there does not seem to

Judgment. be any subject of difference provided for by the Act or
Ferguson, J. by-law to be referred to the fence viewers or arbitrators.

In *Murray v. Dawson*, 17 C. P. at 591, the Court, in delivering judgment, quoted language of Cockburn, C. J., in *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477, at p. 486, as follows:—"Where an Act of Parliament creates a duty or obligation, and gives a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative," and the Court thought that the summary remedy given by the statute was the only one intended. In the same case (19 C. P. at 318) this proposition is again referred to.

The present case does not, as I think, fall within any of the provisions of the statute or the by-law imposing a duty or obligation in respect of which a summary remedy is given by the "peculiar proceeding." There is no dispute between the parties as to what proportion of the fence shall be kept up and maintained by each. They are agreed that each shall keep up and maintain one-half of it, and they are agreed as to which half each shall maintain, and there is no dispute between them as to quantity, description or price.

I am unable to see that the case falls within the provisions of the statute, and for the like reasons I am of the opinion that the case does not fall within the provisions of the by-law, though these provisions differ somewhat from the provisions of the statute, and, besides, the action is for trespass to land, a part of the cause of action being that the defendant has a shed partly upon the plaintiff's lands. There seems to have been a dispute as to the true location of the boundary between the lands of the parties. See the pleadings and the evidence given by the surveyor James, by which it was sought to shew that the boundary line between the lots was really not as had been supposed, the line from which the strip of land purchased by the plaintiff from the defendant had been measured or set off, and in this way the location of the present boundary came in

question, and was decided upon by the trial Judge, as I ^{Judgment.} have said. Neither party has, as I understand, set up and ^{Ferguson, J.} contended that the summary remedy referred to in the statute or by-law is the one that should have been resorted to, instead of an action in this Court.

The case *Hubbell v. Peck*, 15 Conn. 135, referred to on the argument indicates that when adjoining proprietors make a divisional fence the posts shall stand in the dividing line, but this indication is based upon the absolute provision of a statute on the subject: see also *Warren v. Sabin*, 1 Lansing (N. Y.) 79, kindly handed me by C. J. Meredith. These cases cannot, as I think, apply as we have, so far as I know, no such statute or by-law upon that immediate subject, our by-law only providing that the line fence shall be "between the lots" in the city.

The case *Newell v. Hill*, 2 Metc. 180, decides that an occupant of land, who is bound to maintain a fence between his own and an adjoining enclosure, may place half of a fence of reasonable dimensions on the land of the adjoining owner. Chief Justice Shaw in delivering the judgment reasoned this out most clearly, saying eventually, that it is one of those cases in which "equality is equity;" adding that in considering what is reasonable (as to the dimensions of such fence, that is, the extent of the land that it is to occupy), great regard should be had to what is the usage and practice of men of ordinary skill and judgment in the building of fences on their own land, on similar kinds of soil, etc. I do not see that this last observation of the learned Chief Justice has regard to anything but the quantity of land to be occupied by the fence, the one-half of which is to be land of the adjoining proprietor, and a mode of getting at what is a reasonable quantity, a matter that, I think, does not arise in the present case.

The case *Vowles v. Miller*, 3 Taunt. 137, is sometimes referred to as an authority shewing that where there is no contract or statutory provision governing the subject, the person who makes a fence between his close and that of an adjoining tenant must make it wholly on his own land.

Judgment. The case does not seem to me to fully support this statement (though the language of Lawrence, J., on p. 138, quoted in Hunt on Boundaries and Fences, at p. 25, looks strongly in that direction). Yet, if it be assumed that such a fence were made for the mutual and equal benefit of the adjoining owners the proposition would be apparently against the reasoning of Chief Justice Shaw in *Newell v. Hill*. The case went off, as I understand the report of it, on the law of variances.

In the present case the learned Chief Justice expressed the opinion that the fence should be so placed that when completed the vertical centre of the boards should coincide with the line or limit between the lands of the parties. The difficulty with me has been as to what is to be considered the fence or the centre line thereof. This fence is of a kind that is very common in the city, and witnesses were called to shew what has been the practice or usage in the construction of this kind of line or divisional fence. The sum of the evidence given on the subject would seem to be that the line between the boards and posts is the line that is commonly adopted as the line that should coincide with the line or limit between the lands of the persons or parties concerned. The witness Brown goes so far as to say that this is the universal custom in the city, and the witness Van Nostrand gives evidence to the same effect, although not in so strong language. Both of these witnesses are surveyors and professed to have knowledge of the subject. The defendant also says that was his "idea" when constructing the fence in question.

Van Nostrand (when the notes of his evidence are corrected by his affidavit) says that the usual custom or practice is for the person who builds the fence to plant and maintain the posts in his own land on his own side of the fence. No one in the present case contends that the centre line of the fence should be considered the line passing through the centre of the posts or nearly or approximately so or that such line should be the line to coincide with the limit between the lands of the parties. The evi-

dence given on the subject does not disclose anything that has the force of law, or that is binding upon anyone who does not choose to adopt the line between the boards and the posts as the line to coincide with the limit between the respective lands, and the same thing may be said with regard to the evidence as to the one who is constructing and maintaining the fence, placing the posts on his own land and on his own side of the fence. No custom is set up, none is proved, and it may be assumed that none exists, even if in this country a custom could be relied on as having the force of law and binding upon the parties concerned.

Judgment.
Ferguson, J.

After having bestowed upon the subject the best consideration I have been able, I arrive at the conclusion that the learned Chief Justice who tried the case was right in considering the board wall the fence, that which really separates the land of one party from the land of the other, the centre line of which should coincide with the limit between these lands.

Bearing in mind that one-half of the fence dividing it longitudinally is to be upon the land of each party, if the fence is to be of the kind we have described here, and considering the whole of the material in any way employed in and about the fence as being the fence, the right line lying between the posts and the board wall if made to coincide with the mathematical line between the lands of the parties would not leave one-half of the fence upon the land of each party or nearly so in any view that can, as I think, be taken, whether one considers the width of the strip of land of each occupied by the fence or the actual areas so occupied. This method must have been adopted so far as it has been adopted, arbitrarily and for mere convenience, and, as I think, cannot be considered binding.

Then if an effort be made to adopt a line on either side of this line, between the posts and the board wall (taking as aforesaid all the material in any way employed in and about the fence as being the fence), and to locate it so that one-half of the fence will be upon the land of each pro-

Judgment.
Ferguson, J. prietor, taking such half to be either the width of the strip of land on each or the actual area of the land of each proprietor so occupied, it seems plain that the utmost confusion must arise, for neither party is bound to use parts of the same dimensions or diameter as those used by the other party. Nor is either party bound to use posts of the same or a uniform diameter in constructing or maintaining his one-half of the fence.

I only refer to these things as shewing the inconvenience, if not practical impossibility, of adopting such a line as the line to be made to coincide with the mathematical line between the lands of the parties, unless the parties were bound to use posts of a uniform diameter, each party adopting the same diameter, and to use boards of a uniform thickness, each party using boards of the same thickness, which seems to be out of the case. I am, however, as before stated, of the opinion that the board wall is really the fence.

Then there being no agreement between the parties on the immediate subject and no statute or by-law governing the case the parties are left to rely upon their common law rights (including, of course, their rights of property), and where one of the parties is bound to construct and maintain a divisional fence (his part of it) such as the one here, he is bound to build the board wall and maintain it as best he may or can, by appliances placed in or upon his own land, if appliances are necessary, and he is not, as I think, at liberty to place his posts or other appliance for maintaining the fence in or upon the land of his adjoining owner, without leave or license so to do. He may, as I think, employ any method, or use any material he pleases to maintain the fence (the board wall).

It seems to me to be proved that the defendant's shed is partly on the plaintiff's land.

I am of the opinion that, in all the circumstances, the defendant had no right to place the posts in and upon the plaintiff's land as he did, and that he cannot maintain his shed partly upon the plaintiff's land, as it is, and, I think

the conclusion of the learned Chief Justice is right. Much Judgment. was said in argument as to the costs. These were in the Ferguson, J. discretion of the trial Judge and commonly no appeal lies in such a case. It was, however, said that he was in error as to the principle upon which he acted in awarding costs. The principle is clearly enough stated, and I do not perceive the error of the Judge spoken of, nor do I perceive that the fact of the plaintiff being a solicitor makes the difference spoken of.

I think the motion should be refused and the judgment affirmed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE THE TORONTO BELT LINE RAILWAY COMPANY.

Railways—Compensation for Land Taken—"Owner"—Mortgagee—Injurious Affected—R. S. O. ch. 170, sec. 13.

A mortgagor does not represent his mortgagee for purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who under sec. 13 of R. S. O. ch. 170, are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption; leaving the mortgagee entitled to have his compensation for lands taken separately ascertained. Decision of STREET, J., affirmed.

THIS was a motion by way of appeal from the order of Statement. STREET, J., directing a mandamus to issue ordering the above railway company to proceed to ascertain what compensation was due to the mortgagees of certain lands taken by them for the purposes of their railway under the circumstances set out in the judgment of ROBERTSON, J.

The motion was argued on December 10th and 11th, 1894, before ROBERTSON and MEREDITH, JJ.

L. McCarthy, for the railway company.
Goodwin Gibson, for the mortgagees.

Argument. The following authorities were referred to: *Martin v. London, Chatham and Dover R. W. Co.*, L. R. 1 Ch. 501; *Scottish American Investment Co. v. Prittie*, 20 A. R. 398; Lloyd on Compensation, 5th ed., pp. 49, 78-80; *ib.* p. 130; *Young v. The Midland R. W. Co.*, 16 O. R. 738, 19 A. R. 265, 22 S. C. R. 190.

March 2nd, 1895. ROBERTSON, J.:—

This is a motion by way of appeal from the order or judgment of Street, J., made on the 29th June, 1894, directing that a mandamus do issue, ordering the Toronto Belt Line Railway Company to proceed by arbitration in the manner provided by the Railway Act of Ontario (R. S. O. ch. 170), to ascertain the compensation properly payable to the Western Canada Loan and Savings Company, who are mortgagees, for the injury and damage sustained by them through the taking by the railway company, for the purposes of their railway, of a portion of the east half of lot 37, in the 3rd concession from the bay, in the township of York, on the grounds:—

1st. That the loan company are not the owners of the said property, and are therefore not entitled to an order of mandamus;

2nd. That the railway company have settled and fixed the amount of compensation due herein with the owner of the lands and have paid him the same, and consequently the loan company are not entitled to such order compelling the railway company to arbitrate, and any rights they may have are governed by sub-section 25 of section 20 of the said Act;

3rd. That the said order was improperly granted, as the loan company have not exhausted all their rights for obtaining the payment of their mortgage herein against the mortgagor of the property.

The facts are as follows:—One Daniel Webster Clendennan, then being the owner in fee, on November 1st, 1888, mortgaged the lands through which the railway

now passes, to one Henry O'Brien, to secure the payment ^{Judgment.} of a large sum of money, about \$25,000, and by an assign- ^{Robertson, J.} ment of such mortgage, dated November 21st, 1888, O'Brien assigned to the loan company, whereby the loan company became mortgagees of the lands in the mortgage described. Subsequently to the taking of the assignment and without notice to, or permission from the loan company, the railway company appropriated to the use of their railway a portion of the said lands, comprising about three acres, and used the same for the purposes of their said railway, and continue to use the same for such purpose up to the present time, and the loan company complain that through the construction of the said railway a portion of the remaining lands comprised in said mortgage has been injuriously affected. Frequent attempts on the part of the loan company have been made to obtain an amicable settlement from the railway company for the value of the land so taken, and for the damage occasioned to the remaining lands by the construction of the said railway, but no settlement has been arrived at, and the railway company refuse to admit any liability on their part to pay any sum whatever in respect of such compensation and damages. Under these circumstances the loan company gave to the railway company a notice of motion for a mandamus ordering them to proceed to arbitration in the manner provided by the Railway Act of Ontario. And that motion was opposed by the railway company, setting up an agreement entered into between the said Clendennan and the railway company, bearing date February 18th, 1891, afterwards carried out by a deed bearing date November 1st, 1891, conveying to the railway company the lands appropriated by them for the use of their railway in consideration of \$10 and certain benefits derived by the adjoining property of the said Clendennan (being the said mortgaged property) by the construction of the line of railway in the place named in such agreement, and the construction of the switch station and other considerations set out in the said agreement.

Judgment. At the dates of the agreement and deed above mentioned, Clendennan was only entitled to an equity of redemption in the lands in question, the loan company being the owners in fee, subject to that equity. Sub-section 9 of section 2 of the Railway Act of Ontario (R. S. O. ch. 170) declares that "owner" shall be understood to mean any corporation or person who, under the provisions of this Act, or the special Act, or any Act incorporated therewith, would be enabled to sell or convey lands to the company. Section 6 declares that "the power given by the special Act to construct the railway, and to take and use the lands for that purpose, shall be exercised subject to the provisions of this Act." And, section 7 declares that for the value of lands taken and for all damages to lands injuriously affected by the construction of the railway, in the exercise of the powers by this or the special Act or any Act incorporated therewith, vested in the company, compensation shall be made to the owners and occupiers of, and to all other persons interested in any lands so taken or injuriously affected.

By section 13, (1), all corporations and persons whatever, tenants in tail or for life, guardians, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other persons, seized, possessed of, or interested in any lands, may contract for, sell and convey unto the company, all or any part thereof.

The effect of a sale under this 13th section is, by section 14, declared to be valid, and any contract, agreement, sale, conveyance and assurance made under it shall be effectual in law to all intents and purposes whatsoever, and shall vest in the company receiving the same the fee simple in the lands in such deed described, freed and discharged from all trusts, restrictions and limitations whatsoever, and the corporation or person conveying is indemnified under the section for what he or it respectively does by virtue of or in pursuance of the Act.

And section 15 declares that "the company shall not be responsible for the disposition of any purchase money for any lands taken by it for its purposes, if paid to the owner of the land, or into Court for his benefit, as hereinafter provided."

By sub-section 26 of section 20, "If the company has reason to fear any claims or incumbrances * * or if for any other reason the company deems it advisable, the company may pay the compensation into the office of the accountant of the Supreme Court of Judicature, with the interest thereon for six months, and may deliver to the accountant an authentic copy of the conveyance or of the award or agreement," etc.

Then going back to sub-section 9 of section 20, it will be seen, in reference to an arbitration in case it should be necessary, that the arbitrators in deciding upon the value or compensation to be allowed to the owner, "are authorized and required to take into consideration the increased value that would be given to any lands or grounds through or over which the railway will pass by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and to set off the increased value that will attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands," etc.

The question therefore arises does a mortgagor come within the provision of section 13 of the Act to such an extent as to enable him, as "owner," to contract for, sell and convey unto the company all or any part of the said lands? There is no doubt he has an "interest," but not as tenant in tail, for life, or as a trustee, etc.; he has a simple equity of redemption. His mortgagees have also an interest, which interest is not represented by him, and not being represented, he certainly cannot dispose of the fee simple in the lands. His case is not provided for, like that of the corporations, persons, tenants in tail or for life, executors, trustees, etc., mentioned in the 13th section; nor

Judgment.
Robertson, J.

Judgment. as if he was a joint tenant, or tenant in common, as provided for in section 18 of the Act—he has a bare equity, and a conveyance from him amounts to nothing more than a mere assignment of his equity. The railway company have got rid of him, but they have still to deal with the mortgagees, who are also interested, and whose conveyance is requisite to give the railway company the fee simple in the lands.

If the statute authorized more than this, it would be a most violent and unnecessary interference with the rights of property: per Spragge, C., in *Cameron v. Wigle*, 24 Gr., at p. 10.

The several classes of persons and corporations mentioned in the 13th section represent all parties interested, who have power to contract for, sell and convey to the railway company all or any part of the lands, and having power to do that, the fixing of the compensation money, as a matter of legal consequence, follows, so that, as the Chief Justice of Ontario says, in *Young v. Midland R. W. Co.*, 19 A. R., at p. 267, “the tenant for life in the absence of fraud, and in good faith, had power to fix on the amount of the purchase money, for all the interests therein, and the remainderman would be bound by such price.” Not so, however, in the case of mortgagor and mortgagee. The former does not represent, under the statute, the interests of the mortgagees; and while I think the mortgagor may treat with the railway company for his interest or equity of redemption, and convey that interest or equity, he does not in any way represent his mortgagees, they having an interest as well, and one which may be ten times as great as that of the mortgagor, but not certainly controlled by him.

It may be that the compensation is adequate to cover the interest of the mortgagees; that an increased value is given to the lands by reason of the passage of the railway through or over the same, or by reason of the construction of the railway; but that makes no difference; the mortgagees are the only parties interested, so far as their

mortgage interest is concerned; they alone can deal with Judgment. that, and have an undoubted right to be treated with by Robertson, J. the railway company in regard to that interest, and as they cannot agree, the statutory remedy, by arbitration, is the only one open to the parties.

In my judgment, the actual position of the parties at this moment is this: The railway company have got a good and valid conveyance of the equity of the mortgagor in the land in question, and the owner of the equity of redemption is satisfied as far as he is concerned, but the incumbrancers are not satisfied; they claim that they are entitled as parties interested, to compensation, over and above what the owner of the equity has agreed is sufficient for his interest. The railway company deny their right to anything more, and the loan company gave their notice to proceed under the Railway Act to arbitrate, which the railway company have refused to do. I think the loan company are within their rights, and that my learned brother Street was right in making the order for the mandamus now appealed against.

For these reasons the appeal must be dismissed with costs.

MEREDITH, J.:—

The railway company cannot now treat the matter as if they were merely purchasers of land from the owner of the equity of redemption; they proceeded to take the land under the provisions of "The Railway Act of Ontario," and, under section 19, have taken a conveyance from the mortgagor, having agreed and contracted with him only touching the land and the compensation; they so presented the facts upon this application, and not until the argument before us did they make any claim to defeat it on the ground that the provisions of the Act are not applicable: see R. S. O. ch. 170, sec. 19, sub-sec. 2.

Then the applicants are mortgagees, and the land has been acquired and compensation settled for behind their

Judgment. backs. Does the Act authorize this? If not, are they
Meredith, J. entitled to an arbitration on the subject of compensation?
These are the two questions involved in the case.

Section 7 provides that the railway company shall make compensation to the owners and occupiers of and to all other persons interested in any lands taken or injuriously affected; and that unless otherwise provided the amount shall be ascertained and determined in manner provided by the Act.

And section 19 provides that after one month from the deposit of the map or plan and book of reference, shewing the course and direction of the railway and the lands intended to be passed over and taken, and from the publication of notice thereof, "application may be made to the owners of lands or to parties empowered to convey lands, or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for the railway," and that "thereupon agreements and contracts may be made with such parties touching the said lands, or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained as may seem expedient to both parties; and in case of disagreement between them or any of them, then all questions which arise between them shall be settled as in the next section mentioned,"—that is the arbitration clauses section.

Reading these two sections together, the fair conclusion is that any one interested in the lands is entitled to compensation, and that such compensation can be had only under the arbitration clauses.

Mortgagees are certainly interested in the mortgaged lands. Then is there anything to cut down their right to such compensation; or leaving them free to enforce the usual right of mortgagees against the lands?

Sections 13 and 18 give certain persons and corporations power to sell and convey to the railway company not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they

represent ; but a mortgagor is not mentioned, nor can he ^{Judgment.} come within the general words of section 13, because, ^{Meredith, J.} even if they can be extended to any case beyond those expressly mentioned, a mortgagor cannot be said to represent his "mortgagee"; and section 18 applies only to joint tenants and tenants in common ; and there is nothing authorizing the payment of compensation to such persons beyond the portions which they are entitled to receive for their own benefit : see *Young v. Midland R. W. Co.*, 16 O. R. 738, 19 A. R. 265, and 22 S. C. R. 190.

So that, although the Act is anything but clear upon the subject, my conclusion is that these mortgagees are persons interested in the land in question who are entitled to claim compensation, to be ascertained and determined in manner provided by the Act.

It may be that they are entitled to nothing ; it may be that what the railway company did under their agreement with the mortgagor was ample compensation for them as he appeared to have in good faith considered it for himself ; but that is a subject for the consideration of the arbitrators or arbitrator ; the railway company with notice of the mortgage in question, chose, without the warrant of any provision of the Act for so doing, to deal with the mortgagors behind their backs ; and so have no just cause for complaint if the subject be reopened by persons interested in the land whom they ignored.

On the subject of compensation for mortgaged lands taken or injuriously affected, it seems to me that a mortgagee must have the right to insist that he is a person interested in the lands and in the compensation and also in the proceedings by which it is fixed : see *Scottish American Investment Co. v. Prittie*, 20 A. R. 398 ; *Dunlop v. Township of York*, 16 Gr. 216 ; *In re Nickle and the Corporation of the Town of Walkerton*, 11 O. R. 433, at p. 437 ; *McMullen v. Free*, 13 O. R. 57 ; *Fairclough v. Marshall*, 4 Ex. D. 37 ; and *Van Gelder, Apsimon & Co. v. Sowerby Bridge United District Flour Society*, 44 Ch. D. 374.

Judgment.
Meredith, J. There are doubtless many, very many cases, in which the subject is one of practical unconcern to the mortgagee; he may be so amply secured, or the lands may be so little affected, that the matter really does not substantially—however it may technically—affect his rights at all. On the other hand the subject may be one of the greatest importance to him, his security may be most seriously affected, especially when it consists of city property; or the mortgagee may, as is not unfrequently the case, be the only person substantially concerned, his security may be so insufficient, that he may be to all practical intents and purposes the owner, and the mortgagor, except in name, but a tenant; and that seems to be pretty much the state of affairs in this case.

Sub-sections 25 and 26 of section 20 have reference to compensation duly fixed under the provisions of the Act, and so do not help in this case, where the question is: Has compensation been fixed so as to bind the applicants?

Having regard to all these things, we ought to require pretty plain language in any legislation to warrant a holding that what was in this case done is binding upon the applicants, of whose rights the railway company had notice, and who were quite as accessible to them as the person with whom they dealt. To say the least of it, the Act is not so plain; and no case in point is cited in support of the appeal; no case of mortgagor and mortgagee under either of our railway Acts at all in point; nor any case to which effect was given to a railway company's like claim, except where the person dealt with was one of the classes expressly mentioned in the Act. Therefore, in my opinion, this appeal should be dismissed.

A. H. F. L.

[CHANCERY DIVISION.]

FLICK V. BRISBIN.

*Constitutional Law—Powers of Dominion Parliament—Assault and Battery
—Bar of Civil Remedy—Criminal Code, 1892—55-56 Vict. ch. 29, secs.
865, 866.*

Sections 865 and 866 of the Criminal Code, 1892, whereby it is enacted that a person who has obtained a certificate of the Justice, who tried the case, that a charge against him of assault and battery has been dismissed, or who has paid the penalty or suffered the imprisonment awarded shall be released from all further proceedings, civil or criminal, for the same cause, are *intra vires* of the Dominion Parliament.

THIS was an action brought by Charles G. Flick against a police constable named Henry Brisbin, claiming damages for assault. Statement.

The defendant pleaded not guilty, referring to R. S. O. ch. 73, sec. 1, 13, 14, 15 and 20.

The action was tried on October 18th, 1894, before ARMOUR, C. J., who dismissed it with costs, upon the ground that prior proceedings had been taken by the plaintiff against the defendant in the police court, when the charge was dismissed: see the Criminal Code, 1892 55-56 Vict., secs. 865 and 866.

The plaintiff on January 10th, 1895, moved by way of appeal before the Divisional Court, consisting of BOYD, C., and FERGUSON, J.

Smyth, for the plaintiff. The case was one of aggravated assault, C. S. C. ch. 91, sec. 44, therefore, cannot be relied on, dealing as it does only with common assault. Sections 865 and 866 of the Criminal Code, 1892, are *ultra vires* as an interference with No. 13 of sec. 92 of the British North America Act. The Dominion Parliament could not deprive the defendant of his common law right to bring a civil action for the assault. *Doyle v. Bell*, 11 A. R. 326, 3 Cart. 297, is distinguishable. If the Dominion Parliament were creating a new crime, it may be it could say that

Argument. there should or should not be a civil remedy as concurrent with it.

Fullerton, Q. C., for the defendant. The statement of claim only lays a common assault, though the charge in the police court was for an aggravated assault. But a criminal charge for an aggravated assault includes one for a common assault. In discharging it as an aggravated assault, they discharged it as a common assault. Apart from that a right to bring an action would scarcely be described as property. Would it be a civil right? : see *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96, 1 Cart. 265. *Hodge v. Queen*, 9 App. Cas. 117, 3 Cart. 144, shews that the power to punish includes all necessary to that power: see also, *Russell v. Queen*, 7 App. Cas. 829, 2 Cart. 12; *Tennant v. The Union Bank of Canada*, [1894] A. C. 31; *Smith v. Merchants Bank* 28 Gr. 629. 1 Cart. 828; *Cushing v. Dupuy*, 5 App. Cas. 409, 1 Cart. 252; *McArthur v. Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, 4 Cart. 559.

Smyth, in reply.

March 2nd, 1895. BOYD, C.:—

The question argued was whether secs. 865 and 866 of the Criminal Code, 1892, are *ultra vires* in so far as regards the right of action for assault thereby interfered with. In my opinion the legislation is a legitimate exercise of the power of the Dominion in regard to the criminal law and procedure: B. N. A. Act, 1867, secs. 91, sub-sec. 27. The Code gives one who is assaulted the option to proceed by complaint in a summary way before a magistrate, and if he elects to take his remedy by this method of private prosecution, he forgoes his right of action in respect of the same assault in order to recover damages as a civil wrong. The reason of the law is clearly brought out by Mr. Justice Hawkins, in *Nicholson v. Booth*, 16 Cox C. C., at p. 376, on an analogous English statute: "A person when assaulted may be so assaulted as to sustain

grievous injury entitling him to compensation for his great bodily suffering, or the assault may be accompanied by such insulting conduct as well as bodily suffering that he would be entitled to damages for the insult and contumely offered to him, as well as for bodily injuries. It is well known that considerable damages are given in actions for assault. It may, therefore, well happen that the person aggrieved by an assault may not desire to have the person assaulted convicted, for the conviction would operate as a bar to his civil remedy. Now, if justices could convict without the complaint of the party aggrieved by an assault, they would have the power to bar the right of the person aggrieved to bring his action for damages." Then, he points out that the sections in question in the statute, similar to those in the Code, "give the prosecutor the option whether he will pursue his civil or criminal remedy," and proceeds, "otherwise the defendant committing the assault would be liable to the double penalty of being convicted and mulcted in damages."

Judgment.

Boyd, C.

In this case the party aggrieved made complaint to the police magistrate and prayed for the summary disposal of the matter with the result that the charge was dismissed. That concludes the prosecutor in a civil proceeding for the same assault upon the production of the certificate of dismissal: *Tunnickliffe v. Tedd*, 5 C. B. 553; *Vaughton v. Bradshaw*, 2 C. B. N. S. 103. Nothing turns upon the assault being charged to be of an "aggravated" character, for as pointed out in *Regina v. Miles*, 24 Q. B. D. 423, the aggravating circumstances unless coupled with the assault amounted to no crime, and the fact of any assault is negated by the certificate.

The constitutional question has been before the Supreme Court of New Brunswick with the same result, *Allen, C. J.*, saying (as to the 45th section of 32-33 Vict. ch. 20, 1869, which is the earlier form of section 866 of the present Code): "As that section is a part of the Criminal Law which belongs exclusively to the Dominion Parliament, it had a right to impose that consequence upon a party who

Judgment. voluntarily submitted himself to a summary trial in a case of assault: *Wilson v. Codyre*, 26 N. B. 516, at p. 520, (1886).
Boyd, C.

The point is very much the same as in *Aitcheson v. Mann*, 9 P. R. 253 and 473: the Dominion gives a right of summary trial to the person aggrieved in a case of assault on condition that he does not afterwards bring a civil action.

The objection that the certificate was not "forthwith" granted is also answered by authorities. That word so used means not forthwith upon the termination of the proceedings, but forthwith upon demand of the person who is entitled to the certificate, *i.e.*, when he requires to use it: *Hancock v. Somes*, 1 E. & E. 795, and *Costar v. Hetherington*, *ib.* 802. .

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

McINTYRE V. FAUBERT.

*Sale of Lands—Assignee for Creditors—Sheriff—Statute of Frauds—
Memorandum in Writing—Purchase of Equity of Redemption.*

A sheriff, selling lands as assignee for creditors, under R. S. O. ch. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser.

THIS was an action brought by the sheriff of the united Statement.
counties of Stormont, Dundas and Glengarry, against the defendant, who had purchased certain lands at a sale by the plaintiff, as assignee for creditors of Peter Bougie, for breach of the defendant's implied contract to pay and satisfy the incumbrances on the property.

The action was tried at Cornwall on March 5th, 1895, before MACMAHON, J., without a jury, in whose judgment the facts are stated.

W. Stewart, and *A. I. Macdonell*, for the plaintiff.

D. B. Maclennan, Q. C., for the defendant.

March 19th, 1895. MACMAHON, J.:—

The plaintiff is the sheriff of the united counties of Stormont, Dundas and Glengarry, and is the assignee of the estate and effects of Peter Bougie by virtue of an assignment for the benefit of creditors under R. S. O. ch. 124, dated October 24th, 1894.

Bougie was the owner of a lot in the village of New Lancaster on which was erected a brick store and dwelling. This property Bougie mortgaged, first, in 1892, to the Atlas Loan Company for \$800, and secondly, in 1894, to Julian Bougie for \$500.

The plaintiff advertised the equity of redemption of the insolvent Peter Bougie in the above real estate for sale by

Judgment. public auction on the 10th of December, 1894. The
MacMahon, deputy sheriff, who represented the plaintiff at the sale,
J. announced that the property was being sold subject to the
existing incumbrances thereon, which with interest and
costs amounted in the aggregate to \$1,337.10. The defen-
dant became the purchaser of the equity of redemption
for the sum of \$10, which amount he immediately paid,
but did not pay off the incumbrances. Subsequently the
first mortgagees advertised and sold the property for \$940,
being the amount then claimed by them for principal,
interest and costs.

A receipt dated December 10th, 1894, was given to the
defendant for the \$10, "being the purchase money
on village lot No. 4 in Lancaster," signed "D. E. McIntyre,
sheriff and assignee, per J. F. S."—the latter being the
initials of the deputy sheriff. A memorandum also appears
on the back of the advertisements of sale, signed for the
sheriff by his deputy.

The action is to recover the sum of \$527, the amount of
the second mortgage and interest thereon, being the dam-
ages claimed to have been caused to the estate of the
insolvent by reason of the alleged breach of the defen-
dant's contract to pay off and satisfy the incumbrances on
the land.

When the plaintiff accepted the assignment made to him
by the insolvent the equity of redemption passed to the
plaintiff. He as the owner of the equity of redemption
when selling it could not sign any contract which would
bind the purchaser. This is not like the case of *Flintoft*
v. *Elmore*, 18 C. P. 274, where the plaintiff as sheriff was
selling the property of the execution debtor. There the
sheriff is the third party, and by reason of his being a
third party he is the agent of both the seller and purchaser,
and when goods are knocked down and he signs a proper
memorandum that binds the purchaser. The sheriff in
such a case stands in the same position as an auctioneer.

"Neither of the contracting parties themselves can be
the agent of the other for such a purpose": (the signing of

the contract). "The agent contemplated by the Legislature who is to bind the defendant by his signature must be some third person; and an auctioneer who signs the defendant's name by his authority cannot afterwards sue the latter upon the contract authenticated by such signature": Addison on Contracts, 9th ed., 41. See also the cases referred to in *Regina v. Rawson*, 22 O. R. 467.

Judgment.
MacMahon,
J.

The plaintiff as assignee signed the memorandum, by which it is alleged the defendant is bound. This I regard as being insufficient to bind the defendant.

The advertisement is silent as to incumbrances on the land and the particulars are therefore defective. But this was sought to be remedied by inserting in the memorandum of sale, on the face and back of the advertisements, the effect of the verbal statement made just prior to the sale. The conditions or particulars cannot be added to by verbal declaration at the time of the sale: *Higginson v. Clowes*, 15 Ves. at p. 521.

The amount of the incumbrances was not truly stated, the aggregate being \$375.45 or nearly \$40 in excess of the amount stated at the sale.

The payment of the \$10 was no part performance of the contract, and there was no memorandum of the contract signed by the defendant, without which the plaintiff could not succeed.

There must be judgment dismissing the action with costs.

A. H. F. L.

[CHANCERY DIVISION.]

TREVELYAN ET AL. V. MYERS.

Judgment—Foreign Judgment—Merger—Right to Sue on Original Cause of Action.

A foreign judgment is not a merger of the original cause of action, which may, notwithstanding such judgment, be sued on in this Province.

Statement.

THIS was an action brought by two surviving trustees upon a covenant contained in a mortgage executed in England, mortgaging real estate there: the mortgagor and mortgagees living in England at the time of the execution of the mortgage.

The principal defences relied upon were (1) That as a judgment had already been recovered on the covenant against the defendant in the High Court of Justice in England, the right of action on it had become merged in that judgment, and no further action could be maintained upon it, and (2) That if such right of action did become so merged this action founded on a foreign judgment was barred by the Statute of Limitations as the judgment in England was recovered on June 13th, 1887, and the writ herein was not issued until October 18th, 1893.

The action was tried at Toronto, on March 25th, 1895, before MEREDITH, C. J., without a jury.

Walter Cussels, Q. C., and W. H. Lockhart Gordon, for the plaintiffs. While this claim in England might possibly be merged in the judgment obtained there, under *Ex p. Fewings—In re Sneyd*, 25 Ch. D. 338, that is not the case where the action is brought in Ontario. The merger is merely territorial, and the English judgment in this country is only evidence of the debt. A judgment recovered in a colony is not held by the English Courts a bar to an action in England on the original cause: *Piggott on Foreign Judgments*, 2nd ed., pp. 22-30; *Smith v. Nicolls*,

5 Bing. N. C. 219; *The Bank of Australasia v. Harding*, Argument, 9 C. B. 661. A judgment recovered in Jamaica is no^r bar to an action on the original cause in New Brunswick: *Fergus v. Wardlaw*, 3 Kerr 5 N. B. 665; see also *Eastern Townships Bank v. H. S. Beebe & Co.*, 53 Vermont 177; *Hall v. Odber*, 11 East 118, at pp. 124, 126. If in England a suit can be brought upon the original cause of action notwithstanding a judgment recovered in a colony where the contract was made and the contracting parties resided, the converse proposition should hold good.

A. Monro Grier, and *Orville M. Arnold*, for the defendant. The law as cited by plaintiff's counsel is founded upon the assumption that a foreign judgment is only *prima facie* evidence of a debt which is incorrect: *Godard v. Gray*, L. R. 6 Q. B. 139. A foreign judgment makes the debt of a higher nature: *Grant v. Easton*, 13 Q. B. D. 302. In *Smith v. Nicolls*, the decision turned largely upon the fact that the judgment was not that of a Court of record, and the principle laid down there and referred to in *Piggott on Foreign Judgments*, 2nd ed., pp. 23-30, is subsequently questioned by him pp. 31 to 60, as well as by *Hukm Chand* on the *Law of Res Judicata*, secs. 209-213; see also *Barber v. Lamb*, 8 C. B. N. S. 95. A judgment in favour of the defendant in an English Court would be an absolute bar here: 2 *Black on Judgments*, secs. 825-827. The original cause of action is merged in the judgment: *Toronto Dental Manufacturing Co. v. McLaren*, 14 P. R. 89, and so this action is not brought in time: *North v. Fisher*, 6 O. R., at p. 208. The cause of action here is *res adjudicata*: 2 *Kent's Com. (Lacy)*, 119, 120; *Story's Conflict of Laws*, 8th ed., sec. 598; see vol. 3, *American and English Ency. of Law*, 527-535, "Conflict of Laws."

April 1, 1895. MEREDITH, C. J. :—

The question for decision is whether the plaintiffs' right of action upon the covenant sued on was merged in or extinguished by the judgment recovered by them and their

Judgment. deceased co-trustee against the defendant for the same
Meredith, cause of action in the High Court of Justice in England
C.J. before the commencement of the present action.

It was not disputed that the English judgment is to be treated as a foreign judgment, but it was contended by counsel for the defendant that a foreign judgment of a court of record operates so as to occasion a merger or extinguishment of the original cause of action at all events where, as is the case here, that is the effect of the judgment in the country in which it was recovered, and the correctness of the decisions and dicta in which the contrary has been determined or stated or assumed to be the law was impugned mainly upon the grounds which are fully stated in Mr. Piggott's work on Foreign Judgments, 2nd ed., p. 22 *et seq.*

Whatever justice there may be in Mr. Piggott's criticism and that of counsel, the rule which they impugn has been so long recognized and acted upon that it is binding upon me.

In Smith's Leading Cases 9th ed., vol. 2, p. 869, the rule is thus stated: "They (*i.e.*, foreign judgments) certainly do not occasion a *merger* of the original ground of action * * . And, when it becomes necessary to enforce them in this country, the plaintiff has his option either to resort to the original ground of action or [sue] on the judgment recovered."

And the leading text writers and commentators recognize and state the rule substantially in the same way: Addison on Contracts, 9th ed., 178; Story's Conflict of Law, 8th ed., sec. 599*a*, and note *a*, at p. 823; Westlake's International Law, 3rd ed., sec. 332. This statement of the law appears to be warranted by numerous cases and the dicta of eminent Judges to some of which I propose briefly to refer.

In *Hall v. Odber*, 11 East 118, Le Blanc, J., said: "It is clear that a foreign judgment is no merger of a simple contract debt," p. 126; and Bayley, J., "This being only a foreign judgment did not extinguish or merge the plain-

tiff's simple contract debt;" and the language of Lord Ellenborough was to the same effect.

Judgment.
Meredith,
C.J.

In that case the plaintiff sued upon the foreign judgment and for the original cause of action in respect of which it had been recovered, and the decision was that the judgment was no bar to a recovery for the original cause of action.

In *Smith v. Nicolls*, 5 Bing. N. C. 208, although there were other grounds upon which the defence of the judgment recovered in the foreign country was held not to be an answer to the action for the conversion for which it was brought, the rule was distinctly recognized, and was relied upon as one of the reasons for which the defence was held to afford no answer to the plaintiff's claim.

In *The Bank of Australasia v. Harding*, 9 C. B. 661, the action was brought for the original cause of action and upon demurrer to a plea of judgment recovered in the Supreme Court of New South Wales in respect of it the plea was held to present no answer to the cause of action, and it was expressly determined that the right to sue for the original cause of action remained, and that there was in the English Courts no merger of it in a higher remedy.

In *The Bank of Australasia v. Nias*, 16 Q. B. 717, the Court expressed its entire concurrence in the decision of the Court of Common Pleas in the preceding case referred to.

In a recent case *In re Henderson, Nouvion v. Freeman*, 37 Ch. D. 244, Lord Justice Cotton, at p. 250, said: "A foreign judgment does not, in the view of an English Court, merge the original cause of action, but if the party likes to proceed here on his original cause of action, he may do so, notwithstanding the foreign judgment. If he elects to proceed on the foreign judgment, then he must shew that the matter has been adjudicated upon by a competent Court, and that the adjudication is final and conclusive.

The present Lord Chancellor of England in *Hawksford v. Gifford*, 12 App. Cas. 122, referring to the rule, said :

Judgment. "This action is brought upon an English judgment, which,
Meredith, until judgment was obtained in Jersey, was in that coun-
C.J. try no more than evidence of a debt," p. 126.

I refer also to the language of Collins, J., in *Crozat v. Brogden*, [1894] 2 Q. B., at p. 33.

The point has arisen in two Canadian cases, and in both of them the rule of the English Courts has been recognized and acted upon.

In *Fergus v. Wardlaw*, 3 Kerr 5 N. B. 665, the Supreme Court of New Brunswick held a plea of a foreign judgment set up in answer to an action for the original cause of action to be bad. And in *Barned's Banking Co. v. Reynolds*, 36 U. C. R., at p. 288, the late Sir Adam Wilson, delivering the judgment of the Court of Queen's Bench of this Province, made use of the following language: "Assumpsit or debt, is the form of action brought upon foreign judgments. They are simple contract debts in this country, whatever force as debts by specialty or record they may have in the country of their recovery; and non-assumpsit, or never indebted, may be pleaded to an action on such judgments. The original cause of action is not merged by the recovery of a foreign judgment." Citing for this *Hall v. Odber*, and *Smith v. Nicolls*, to which I have referred.

I am therefore of opinion that the defence set up is no answer to the plaintiffs' claim, and there will be judgment for the equivalent in dollars and cents of the £5,500 principal money with interest at the rate of 5 per cent. per annum from the day up to which the interest has been paid.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE MCGOLRICK V. RYALL.

*Prohibition—Division Court—Promissory Notes—Separate Causes of Action
—Title to Land—Sale of Liquor—Lost Note.*

In settlement of an action on a promissory note for \$383 given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern-keeper, agreed in writing to give, and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of \$125 each :—

Held (1), that each note was a separate cause of action and could be sued in the Division Court.

(2) That the title to land did not come in question.

(3) That the words "liquors drunk in a tavern or alehouse" in sub-section 2 and "such liquors" in sub-sec. 3 of sec. 69 of the Division Court Act mean liquors drunk in the tavern or alehouse of the vendor.

(4) The non-filing of a bond of indemnity for a lost note is a matter of practice, and is not a ground for prohibition.

Prohibition to a Division Court refused.

THIS was a motion by the defendant for prohibition to the Junior Judge of the county of Kent to prohibit further proceedings in three complaints in the First Division Court of that county to recover the amounts of three promissory notes for \$125 each, made by the defendant and held by the plaintiff. Statement.

It appeared that the plaintiff, who was a liquor dealer and had a shop license, in the ordinary course of his business sold liquors to the extent of about \$383 to the defendant, who was a tavern-keeper and had a tavern license, and took a note for the amount. After the note had been renewed and not paid the plaintiff took proceedings on it in the County Court, which action the defendant settled by entering into an agreement in writing to give security on certain land owned by him and a new note at three months for the amount due and costs.

The agreement dated 21st March, 1893, set out the settlement of the action by the giving a deed of the land, and stipulated that if the defendant gave the note for the amount, the plaintiff would not sell the property for a year unless he could get \$700 for it, and would not accept an offer of any less sum during the year without

Statement. the consent of the defendant; after the expiry of the year he was to be at liberty to sell for the best price obtainable, and to account to the defendant.

The note was duly given, and was subsequently renewed, and the amount due was then divided into the three notes sued on for \$125 each, at one, two and three months, the difference being paid in cash by the defendant.

One of these notes was lost and a bond of indemnity for it was given before the trial, which bond was mislaid in the Court, but a new bond was furnished before judgment was given.

It was contended on behalf of the defendant that the Division Court had no jurisdiction; (1) that the three notes were parts of one entire debt and were not separate causes of action, and the total amount exceeded the jurisdiction of the Court under section 70 of the Division Court Act; (2) that the title to land came in question under the agreement under sec. 69, sub-sec. 4; (3) that the notes were given for liquors purchased which were drunk in a tavern under sec. 69, sub-secs. 2 and 3; and (4) that no proper or sufficient bond of indemnity was furnished for the lost note.

The motion was argued in Chambers on April 19th, 1895, before FALCONBRIDGE, J.

D. Armour, for the motion.

W. H. Blake, contra.

May 6, 1895. FALCONBRIDGE, J.:—

(1) I am of the opinion that there has been no splitting of actions. There would have been three counts in the High Court, and so the plaintiff here may bring distinct plaints in the Division Court.

(2) The title to land did not come into question by reason of the deed and agreement of 21st March, 1893.

(3) "Liquors drunk in a tavern or alehouse" in sec. 69,

sub-sec. 2, and "such liquors" in sec. 69, sub-sec. 3 of the ^{Judgment.} Division Court Act, mean liquors drunk in a tavern or ale-^{Falconbridge,} house of the vendor, and do not include liquors delivered ^{J.} to or carried away by the purchaser and afterwards drunk in the purchaser's tavern or alehouse.

(4) It appears that a bond of indemnity had been lodged with the Court but had been mislaid, and a new one was filed before judgment given. It is a matter of practice and not a ground for interference if the learned Judge had been wrong, which I do not say. Probably the extreme penalty on plaintiff would be costs: *La Banque Jacques Cartier v. Strachan*, 5 P. R. 159.

I think the motion fails, and it must be refused with costs.

G. A. B.

[CHANCERY DIVISION.]

McPHERSON V. IRVINE.

High Court of Justice—Jurisdiction—Revocation of Letters of Administration—Surrogate Court.

The High Court of Justice for Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration.

Statement. THIS was an action brought by Jessie C. McPherson against Margaret Irvine who had taken out letters of administration as next of kin to one Charlotte Wilson, deceased, the plaintiff alleging that she and not the defendant was the next of kin to said Charlotte Wilson, and asking for a declaration to that effect by the Court, and for an injunction restraining the defendant from interfering with the estate of the said Charlotte Wilson, and for administration of the same.

The action was tried at Toronto, on October 10th, 1894, before ARMOUR, C. J., without a jury.

Irving, Q. C., and *Dyce Saunders*, for the plaintiff.
S. H. Blake, Q. C., and *DuVernet*, for the defendant.

January 8, 1895. ARMOUR, C. J. :—

I am of the opinion that this action is not maintainable, the effect of it being, if successful, to work the revocation of the letters of administration granted by the Surrogate Court to the defendant, Margaret Irvine, and this Court having no jurisdiction to revoke such letters, and the letters while unrevoked being binding upon this Court.

These letters were granted to the defendant Margaret Irvine, as the next of kin of Charlotte Wilson, and it was only as the next of kin that she was entitled to them, and the determination of the question whether she was the

next of kin was within the jurisdiction of the Surrogate Court, and that Court has determined it.

Judgment.
Armour, C.J.

It is true that the application for these letters may have been made by the defendant, Margaret Irvine, *ex parte*, and the persons now claiming to be the next of kin may have had no opportunity of contesting her right to them before they were granted, but the granting of them was a judicial act and they are equally conclusive upon this Court of her being the next of kin as if her right to them, as the next of kin of Charlotte Wilson, had been contested in that Court by the persons now claiming to be the next of kin of Charlotte Wilson.

The jurisdiction of the Probate and Surrogate Courts to grant letters of administration was first conferred in this Province by the Act 33 Geo. III. ch. 8, and by the Act 22 Vic. ch. 93, the Probate Court was abolished and its jurisdiction vested in the Surrogate Courts.

At the time of the passing of the Judicature Act the Court of Chancery in this Province had no jurisdiction to revoke a grant by the Surrogate Court of letters of administration, and no jurisdiction is given by that Act to the High Court for such a purpose.

The High Court has jurisdiction in matters testamentary as provided in sections 30 to 32 inclusive of the Surrogate Courts Act, R. S. O. ch. 50.

It has also jurisdiction to try the validity of last wills and testaments, and it has jurisdiction to appoint in certain cases administrators under Con. Rules 310 and 311, and would have the power to revoke any appointment so made.

But no jurisdiction exists in it, nor has been conferred upon it to revoke the grant by a Surrogate Court of letters of administration.

Such being the case, I think that the decision of this case must follow and be governed by the decision of *In re Ivory, Hawkin v. Turner*, 10 Ch. D. 372, and this is a stronger case against the maintenance of this action than that, for the Court of Probate is in England a Division of the High Court.

Judgment. In that case James Ivory having died on the 2nd September, 1878, letters of administration to his estate were, on the 30th September, 1878, granted *ex parte* to the defendant as the intestate's "natural and lawful brother of the half blood." The plaintiff, who was the maternal uncle of the intestate, commenced an action in the Chancery Division on the 8th October, 1878, against the defendant for the administration of the personal estate of the intestate and for a receiver and injunction alleging the defendant to be illegitimate and himself to be the sole next of kin: and thereafter moved before Lush, J., for an injunction and receiver, who held that as long as the letters of administration were in force they were conclusive evidence that the defendant was the next of kin, and that the plaintiff's proper course of procedure was to apply to the Probate Division to have them recalled.

The following cases may also be referred to as bearing on the subject: *Allen v. Dundas*, 3 T. R. 125; *Prosser v. Wagner*, 1 C. B. N. S. 289; *Irwin v. Bank of Montreal*, 38 U. C. R. 375; *Long v. Wakeling*, 1 Beav. 400; *Caujolle v. Ferrie*, 13 Wall. U. S. S. Ct. 465; *Lawrence v. Englesby*, 24 Vt. 42; *Barrs v. Jackson*, 1 Phill. 582, reversing same case, 1 Y. & Coll. C. C. 585; *Whicker v. Hume*, 7 H. L. C. 124; *Concha v. Concha*, 11 App. Cas. 541; *Meluish v. Milton*, 3 Ch. D. 27; *Pinney v. Hunt*, 6 Ch. D. 98; *Allen v. McPherson*, 1 H. L. C. 191.

The action must, therefore, in my opinion, be dismissed, but with only such costs as would have been taxed and allowed to the defendant had she demurred only to the statement of claim and her demurrer had been allowed with costs.

This dismissal of the action will be without prejudice to any proceedings that may be hereafter taken for the revocation of the grant of the said letters of administration, and to any future proceedings for a like purpose to those proceedings or to any other proceedings whatever.

[CHANCERY DIVISION.]

COPE V. COPE ET AL.

Judgment—Action to Establish Will—Decree Establishing “Subject to Dower”—Right to Assignment—R. S. O. ch. 56, sec. 7—Real Property Limitation Act, R. S. O. ch. 111, sec. 25.

In an action by a devisee to establish a destroyed will devising real estate, to which the plaintiff, the widow of the testator was a defendant, she, although she pleaded to the action, did not claim to be entitled to or to recover her dower in the land of which the action also sought to deprive her, and a decree was made declaring that the devisee, one of the defendants hereto was entitled to the land in fee simple, subject to the dower of the plaintiff herein :—

Held, not such a judgment as entitled the dowress to sue out a writ of assignment of dower under section 7 of R. S. O. ch. 56 :—

Held, also, that the decree did not prevent the running of sec. 25 of “The Real Property Limitation Act,” R. S. O. ch. 111, so as to bar the remedy of the plaintiff.

THIS was an action of dower brought by Ruth Cope Statement. the dowress, against Jacob Nelson Cope and the other tenant of the freehold, and was commenced by writ issued on January 12th, 1894.

The defendants relied upon section 25 of “The Real Property Limitations Act,” R. S. O. ch. 111, as a defence the plaintiff’s husband having died December 17, 1879.

The plaintiff claimed the benefit of a judgment recovered on April 17, 1882, declaring that the land in question was subject to her dower under the following circumstances :

After the death of the father, the above Jacob Nelson Cope brought an action to establish his father’s will which he alleged had been destroyed by the present plaintiff and under which he claimed to be entitled to the land in question in fee, and the judgment in that action declared that he was entitled in fee “subject to the dower of the defendant Ruth Cope.”

This action was tried at Hamilton on November 12, 1894, before ROSE, J., without a jury.

John G. Farmer, for the plaintiff.

H. H. Robertson, for the defendants.

Judgment. January 12, 1895. ROSE, J.:—

Rose, J.

Section 25, ch. 111 R. S. O. 1887, enacts that “no action of dower shall be brought but within ten years from the death of the husband of the dowress,” etc.

This action was brought more than ten years after the husband’s death, and if it is the action of dower on which the dowress relies to establish her right she must fail.

Her reply to the defence of the expiry of the ten years is in effect that in 1881 the defendant, her son, brought an action against her in the Chancery Division, claiming “to have it declared that the plaintiff is entitled

* * to the said farm (the land in question) * * as the absolute owner thereof, in fee simple in possession, and freed from the dower of the defendant Ruth Cope * * , and that issue being tried it was determined that she, the then defendant and now plaintiff, was entitled to dower in the said lands, and that the plaintiff’s title thereto was subject to such dower; and that in sustaining her claim to dower, although defendant on the record she was as to the same a plaintiff, and that judgment was therefore rendered in the plaintiff’s favour to recover dower” within the meaning of sec. 30, ch. 55 R. S. O. 1877, now sec. 7, ch. 56 R. S. O. 1887.

It is clear that although the statement of defence in the first action was silent on the question of dower there was an issue as to the right of the widow. If authority is needed for this: see *The Waterloo Mutual Ins. Co. v. Robinson*, 4 O. R. 295; *Seabrook v. Young*, 14 A. R. 97.

I am of the opinion that the widow having claimed her dower in the first action, as I think she did, and that claim having been allowed she must be deemed an actor or plaintiff pursuing: see per Blake, V. C., *Laidlaw v. Jackes*, 27 Gr., at p. 109, and so that the judgment in such action was a “judgment * * rendered in the plaintiff’s favour to recover dower.”

In *Park on Dower*, p. 136 (*298), it is said: “The judgment in this action, generally speaking, is to recover seizin of a

third part of the tenements in demand in severalty, by metes and bounds, and the mesne profits and damages"; referring to *Dennis v. Dennis*, 2 Saund., pp. 331, 332. The postea there appears to be that the husband was "seized of such estate of and in the within mentioned manors, tenements and rents with the appurtenances and advowson within mentioned, that he could endow the said Frances thereof, as the said Frances has within alleged. * * Therefore, it is considered that the said Frances do recover against the said Bridget as well her seizin of a third part of the said manors, tenements and rents with the appurtenances, and of the advowson aforesaid, to hold to her in severalty by metes and bounds, as the value of a third part of the said manors," etc.

Judgment.
Rose, J.

At p. 125 (*273) of Park on Dower, it is said: "The course pursued by the Court of Chancery on the title of dower being established or admitted, appears to be to appoint a commissioner to set out the dower."

Our statute apparently follows a similar practice, and it would seem idle after the question has once been litigated and decided to have it litigated over again.

It follows that after the judgment delivered in 1882, the widow was entitled to sue out a writ of assignment of dower under sec. 30 of ch. 55 R. S. O. 1877.

Having waited so long probably an application to the Court would be necessary for permission, and I think I may treat these proceedings as an application for leave to issue such a writ.

I do not see, however, that I can award damages for detention, for the widow in such action did not claim them and allowed the judgment to go without damages. The plaintiff may have such costs as she would have been entitled to had she presented a petition for leave to sue out a writ of assignment upon the judgment in the first action and the defendant had opposed the same.

From this judgment the defendants appealed to the Divisional Court and the appeal was argued on February

Argument. 14, 1895, before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

E. D. Armour, Q. C., for the appeal. The defendant has had possession ever since the judgment in the former action and no proceedings have been taken by the dowress until this action. She is too late under sec. 25 of R. S. O. ch. 111. The trial Judge has held there was a judgment for dower and to save further litigation has ordered a writ of assignment of dower to issue; but there was no issue of dower in that action, and if there had been, the destruction of the will by the dowress would have been a good answer. The trial Judge also refers to R. S. O. ch. 55, 1877, but section 7 of that Act shews a dower action must be commenced by writ of summons. The proceedings prescribed by section 30 are only after such a judgment. A writ of assignment of dower could only be issued after proceedings taken under the Dower Act and as there prescribed. Even filing a petition to bring in the dowress would not be sufficient to prevent the Statute of Limitations running: *Laing v. Avery*, 14 Gr. 33. The judgment has no effect against the statute without the issue of a writ: *Turley v. Williams*, 15 C. P. 538; *Doe d. Ausman v. Minthorne*, 3 U. C. R. 423; *Wilkinson v. Kirby*, 15 C. B. 430.

John G. Farmer, contra. There was an issue in the first action as to the widow's dower, and the Judge has so held. Her dower was protected all through the judgment. This case is similar to *Laidlaw v. Jackes*, 27 Gr. 101. The defendant should have acknowledged the right to dower and very little costs would have been incurred: *Grieve v. Woodruff*, 1 A. R. 617. The plaintiff is entitled to bring a second action: *Aldrich v. Aldrich*, 24 O. R. 124. A six year old judgment requires some proceeding to be taken to revive it before it can be enforced, and that is taken by this action. As to the Statute of Limitations, I refer to *Mason v. Johnston*, 20 A. R. 412, and the cases there cited.

Armour, Q. C., in reply.

February 28, 1895. ARMOUR, C. J.:—

Judgment.

Armour, C.J.

The plaintiff's husband died on the 17th day of December, 1879, and this action was brought on the 12th day of January, 1894, and to it is pleaded "The Real Property Limitation Act," R. S. O. ch. 111, by section 25 of which, it is provided that "no action of dower shall be brought but within ten years from the death of the husband of the dowress, notwithstanding any disability of the dowress or of any person claiming under her."

The action therefore fails; and of this opinion was the learned Judge, but he held that it might be treated as an application on the plaintiff's part for the issue of a writ of assignment of dower, upon the decree made in the action referred to in the 4th paragraph of the plaintiff's statement of claim; and that such decree would support the issue of such a writ and he gave judgment accordingly.

The pleadings in such last mentioned action, shew that it was brought by the defendant, Jacob Nelson Cope, to establish the will of his father, the husband of the plaintiff, which he alleged that the plaintiff and the other defendants therein, except Peter Wood, had fraudulently destroyed, by which will he alleged that his father, the said Jacob Cope, had devised to him in fee the lands out of which dower is sought in this action; and in his prayer for relief in the said pleadings he claimed, (1) To have the said last will of the said Jacob Cope established by the declaration and decree of this Honourable Court, and (2) To have it declared that he was entitled, under and by virtue of the said will, to the said lands, as the absolute owner thereof in fee simple in possession and freed from the dower of the defendant (the now plaintiff) Ruth Cope, and to have the same vested in him, by the order of this Honourable Court, if necessary.

The pleadings also shew, that the defendant (the now plaintiff) Ruth Cope, although she pleaded to the said action, did not claim in her said plea, that she was entitled

Judgment. to dower in the said lands, nor did she thereby claim to
Armour, C.J. recover her dower therein.

The decree in the said action was made on the 17th day of April, 1882; and by it the Court declared that Jacob Cope, in the pleadings mentioned, died on or about the 17th day of December, 1879, having first made his last will and testament, duly executed so as to pass real estate in this Province; and that the same was unrevoked at the time of his death, and did order and adjudge the same accordingly; and did further declare that under and by virtue of the said will, the said Jacob Cope devised to the plaintiff (the now defendant,) Jacob Nelson Cope, absolutely in fee simple the said lands, and did order and adjudge the same accordingly; and did further declare that under and by virtue of the said will, the said plaintiff (the now defendant,) Jacob Nelson Cope, was entitled to the said lands, as the absolute owner thereof in fee simple in possession, subject to the dower of the defendant (the now plaintiff) Ruth Cope therein, and did order and adjudge the same accordingly; and did further order and adjudge that the said lands be and the same were thereby vested in the said plaintiff (the now defendant,) Jacob Nelson Cope, as the absolute owner thereof in fee simple in possession, subject to the dower of the said defendant (the now plaintiff) Ruth Cope, but free from all other claim, title or interest of the said defendants, or either of them, therein or thereto; and did further order and adjudge that the said defendants Matilda Jane Hore, Ruth Cope, Catherine Arnold and James Arnold, and each and every of them, should forthwith give up possession of all and every part of the said lands to the plaintiff (the now defendant,) Jacob Nelson Cope, or of such parts thereof, as they or either of them might be in possession, but without prejudice to the right of the said defendant (the now plaintiff) Ruth Cope, to dower as aforesaid.

The only issue raised in the pleadings as to dower, if issue it can be called, was raised by the plaintiff in that action in his prayer for relief, in which he claimed to have

it declared, that he was entitled under and by virtue of the ^{Judgment.} said will to the said lands, as the absolute owner in fee ^{Armour, C. J.} simple in possession and freed from the dower of the defendant, Ruth Cope: the issue being, whether, if entitled, he was entitled to the said lands freed from or subject to the dower of the defendant, Ruth Cope: as to this issue the Court ordered and adjudged that he was entitled to the said lands, subject to the dower of the defendant, Ruth Cope.

The only supposable ground for the plaintiff in that action raising such an issue is that by fraudulently destroying the will, the defendant Ruth, Cope had disentitled herself to dower.

If the decree made in that action would of itself warrant the issue of a writ of assignment of dower and such writ would issue as a matter of course thereon, I think the judgment of the learned Judge could be upheld, but I do not think that such a writ could be so issued on this decree.

The decree while recognizing the right of Ruth Cope to dower in the said lands, contains no direction for the recovery by, or the assignment to, her of the said dower and seems to contemplate her taking independent proceedings for the recovery thereof, should she be so advised, and the direction in the decree that she shall give up possession of the said lands without prejudice to her right to dower favours this view.

The words "subject to the dower of the defendant, Ruth Cope," made use of in the decree are so made use of as words of qualification only, qualifying the estate in the said lands to which Jacob Nelson Cope is thereby declared entitled, and which is thereby vested in him, and do not amount to a direction that Ruth Cope shall recover or have assigned to her her dower in the said lands.

It may be that the Court when making the decree, if it had been applied to, would have inserted in the decree a direction that she should recover or have assigned to her her dower in the said lands, but we cannot say what it

Judgment. would have done : it is sufficient for us to say that it has
Armour, C.J. not done it.

There is nothing in this decree which had the effect of preventing the running of the statute so as to bar the remedy of the plaintiff, and more than ten years had elapsed since the making of this decree before this action was brought.

I am, therefore, of the opinion, that the judgment of the learned Judge must be reversed and this action dismissed with costs.

FALCONBRIDGE and STREET, JJ., concurred.

G. A. B.

[COMMON PLEAS DIVISION.]

IN THE MATTER OF MILTON A. THOMAS'S LICENSE.

Prohibition—License Commissioners—R. S. O. ch. 194, sec. 21.

A board of license commissioners under the Liquor License Act R. S. O. ch. 194, is not a body against whom a writ of prohibition will be granted, prohibiting them from issuing a license.

Regina v. Local Government Board, 10 Q. B. D., at p. 321, and *Re Godson and The City of Toronto*, 16 A. R. 452, followed.

Semble, an application under the latter part of sec. 21 R. S. O. ch. 194, for an additional tavern license in a locality largely resorted to in summer by visitors, may be made at any time so long as the license does not extend beyond the prescribed period of six months from the first of May.

Statement. MOTION on behalf of C. S. Gzowski to prohibit John Flett, Thomas Thompson and John Lawrence Coffee, the license commissioners for the district in which Hanlan's hotel on the island opposite Toronto is situate, from entertaining and hearing either of two applications made by one M. A. Thomas for a beer and wine license for said hotel, the grounds alleged being that : The first of said applications was made unaccompanied by a certificate in support thereof, signed by a majority of the electors of

the polling sub-division in which the said premises sought to be licensed are situated as provided by the Liquor License Act; and that the second of said applications was made subsequent to the first day of April, 1895. Statement.

The motion was argued in Chambers before MACMAHON, J., on May 18th, 1895.

Maclaren, Q. C., and W. Lockhart Gordon, for the motion.

McCarthy, Q. C., and James Haverson, for M. A. Thomas, the applicant.

W. M. Douglas, for the license commissioners.

The principal contention urged on behalf of the applicant for the license in answer to the motion was that there was no jurisdiction in the Court to prohibit the license commissioners.

The following authorities were cited by counsel: *Re Godson and The City of Toronto*, 16 A. R. 452, 18 S. C. R. 36; *Ex p. Simon*, 4 Times L. R. 754; *Leeson v. License Commissioners of Dufferin*, 19 O. R. 67; *Hodge v. The Queen*, 9 App. Cas. 117; *Re Hunter's License*, 24 O. R. 153, 522; Shortt on Informations, 433-435; *Re Corporations of Anderdon and Colchester North*, 21 O. R. 476; *Re Cummings and County of Carleton*, 25 O. R. 607; *The Mayor and Aldermen of the City of London, v. Cox*, L. R. 2 H. L. at p. 278; *Ex p. Death*, 18 Q. B. D. 647, at pp. 659 and 660; *The Queen v. The Overseers of the Township of Salford*, *ib.* 687; *In re The Local Government Board*, 16 L. R. Ir. (C. L.) 150; *Molson v. Lambe*, 15 S. C. R. at p. 263; *Johnstone v. Kiernan*, 10 Reps. 313; *Chambers v. Green*, L. R. 20 Eq. 552.

May 20th, 1895. MACMAHON, J.:—

When Thomas made his first application for a tavern license to sell wine and beer only during the summer months, which he did on the first day of April, the peti-

Judgment. tion was not accompanied by a certificate, as required by
MacMahon, sub-sec. 14 of sec. 11 of the Liquor License Act (R. S. O.
J. ch. 194), as amended by 53 Vict., ch. 56, sec. 1, although a
petition and certificate were on the same day presented on
behalf of the Toronto Ferry Company, that company
being, it seems, the owners of the premises known as
Hanlan's hotel.

The second application by Thomas is dated the 29th of April, and was likewise for a wine and beer license only during the summer months. That application was accompanied by a certificate, in compliance with said sub-section 14 as amended, it being certified that the ninety-four signatures appended to the certificate are of the electors entitled to vote at an election for the Legislative Assembly in the polling sub-division in which the premises sought to be licensed are situated, etc.; and that the number of persons signing the said certificate constitute a majority of the electors entitled to vote, etc., and that such majority includes at least one-third of said electors who are residents within the said sub-division.

Mr. Gzowski was one of the ten or more electors of the polling sub-division who objected to the granting of the first application for a license.

No petition was presented to the commissioners objecting to the granting of a license after the presentation of the petition and certificate of the electors, upon which the second application for a license was founded.

By section 21 of the Act, in a city where the locality is largely resorted to in summer by visitors the license commissioners are empowered, if they think fit (in addition to the number of licenses ordinarily permitted to be granted in such city), to grant one additional tavern license, but not to extend beyond six months, commencing on the first day of May in each year.

From the reading of the section and considering the purpose for which, and the time to be covered by, the license when granted, I am inclined to think the application might be made at any time, so long as the license did

not extend beyond the prescribed period of six months, commencing on the first of May. And I reach this conclusion without the aid of sub-sec. 21 of sec. 11, which provides that: "The foregoing sub-sections of this section are declared to be obligatory on the board and inspector, but noncompliance therewith shall not invalidate the action of the board or inspector. Nothing in this sub-section contained shall authorize the granting of a license contrary to the provisions of sub-section 14." That is, the commissioners are expected in the exercise of the administrative duties connected with the granting of licenses, to be guided by the sub-sections comprising section 11; but they have the power to exercise a discretion apparently in all matters except as to granting a license without the certificate of the requisite number of electors as required by sub-section 14: see *Re Hunter's License*, 24 O. R. 522.

Judgment.
MacMahon,
J.

However, the question I have to consider, and the only one upon which it will be necessary to express an opinion is, whether license commissioners are a body against whom the writ can be granted prohibiting them from issuing a license.

Counsel for the motion urged that, as by sub-sec. 18 of sec. 11, every hearing of an application for a license shall be open and public, and the commissioners may summon and examine on oath such witnesses as they may think necessary, and are called upon to prepare a decision or judgment in respect of any such application, they are, therefore, clothed with and exercise judicial functions.

Where in the conduct of an inquiry commissioners summon and examine witnesses on oath for the purpose of enabling them to properly exercise their discretion in granting or refusing a license, no judicial act is performed.

In *In re The Local Government Board*, 16 L. R. Ir. C. L. 150, the board was memorialized to make an order under the Public Health Act, and although the board holding the inquiry, consequent upon the consideration of the memorial, was one before which evidence could be taken upon oath,

Judgment.
MacMahon,
J.

to which witnesses could be summoned, and of which the decision involved discretion, the Court held that the Act was not a judicial one, and prohibition was refused. And in *Regina v. Salford*, 18 Q. B. 687, the Court held that the granting of a license to sell beer by retail is not a judicial act.

In Shortt on Informations, Mandamus and Prohibition, p. 433, the author says: "Various public bodies with definite powers have been called into existence by statute in recent times, and the question has arisen whether they can be made the subject of the prohibitory jurisdiction which the High Court exercises in reference to Courts with limited powers.

Regina v. Local Government Board, 10 Q. B. D. 309, is the case of a class of public bodies where the point was considered, and from which the observations of Brett, C. J., are often quoted as containing an enunciation of the true principle by which the Court should be guided. He said (p. 321): "I think I am entitled to say this, that my view of the power of prohibition of the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than the Superior Courts *the power of imposing an obligation upon individuals*, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

Our Court of Appeal followed the opinion thus expressed in *Re Godson and The City of Toronto*, 16 A. R. 452, the headnote to which is: "That writ (prohibition) is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a Court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual."

By the granting of a license no duty or obligation is imposed on any individual; and the statute provides for

the manner in which the application for the issue of a license may be opposed. Judgment.

As pointed out in the judgment in *The Queen v. The Overseers of the Township of Salford*, 18 Q. B. at p. 691, if the license when issued is void for not complying with the provisions of the statute the question of its validity may be raised by treating it as void. This, I assume, was the course adopted in *Leach v. Clancy* (not reported).

MacMahon,
J.

The motion must be refused with costs.

G. A. B.

[CHANCERY DIVISION.]

LOVE V. WEBSTER.

Assessment and Taxes—Sale of Land for—Setting Aside—Assessment Act R. S. O. ch. 193—55 Vict. ch. 48 (O.)—Sections 121, 141 and 142.

The provisions of section 121 of the Consolidated Assessment Act as to entering on the roll, by the clerk of the municipality, opposite to each lot or parcel all the rates or charges with which the same is chargeable in separate columns for each rate is imperative, and non-compliance therewith renders such roll a nullity. And where the amount of such rates or taxes for one year was entered on the roll in one sum, and the roll was so transmitted to the treasurer of the county, a tax sale founded thereon was held invalid.

The provision of section 141 of the said Act, which requires a true copy of the lists returned by the assessors to the clerk to be furnished to the county treasurer certified to by the clerk under the seal of the corporation, and that of section 142 which requires an assessor's certificate to each list, are also imperative.

The principle of the decision in *Town of Trenton v. Dyer*, 21 A. R. 379, followed.

THIS was an action brought by James Love against W. J. Webster to set aside a tax sale of a farm in the township of Olden in the county of Frontenac on the ground that the provisions of the Assessment Act R. S. O. ch. 193; 55 Vict. ch. 48 (O.), particularly those of sections 121, 141 and 142, had not been complied with: the defects complained of being that the different rates chargeable against the land were not separately set out as provided for by Statement.

Statement. section 121, but were charged in a lump sum for the year 1889, and that no copy of the lists returned to the clerk by the assessors had been furnished to the county treasurer as provided for by section 141, and no certificate of the assessor was attached, as provided for by section 142.

The action was tried at Kingston on March 19, 1895 before ARMOUR, C. J., without a jury.

Geo. M. Macdonell, Q. C., for the plaintiff. The non-resident roll for the year 1889 was a nullity for non-compliance with section 121 of the Assessment Act in not setting out the different rates charged against the land in question: *Coleman v. Kerr*, 27 U. C. R. 5; *DeVannev v. Dorr*, 4 O. R. 206; *Re Ridsdale and Brush*, 22 U. C. R. 122; *Jones v. Bubb*, L. R. 4 C. P. 468; *Ainsworth v. Creeke*, *ib.* 476; *Bell v. McLean*, 18 C. P. 416. No true or sufficient copy of the list returned by the assessor to the clerk was returned by the clerk to the treasurer, and so section 141 of the Act was not complied with. The sale was bad: *Town of Trenton v. Dyer*, 21 A. R. 379. I also refer to *Donovan v. Hogan*, 15 A. R., at p. 445; *Deverill v. Coe*, 11 O. R. 222; *The Bank of Toronto v. Fanning*, 18 Gr. 391; *Smith v. The Midland R. W. Co.*, 4 O. R. 494; *Haisley v. Somers*, 15 O. R. 275; *Claxton v. Shibley*, 10 O. R. 295.

J. L. Whiting, for the defendant. The non-resident roll for 1889 mentioned the lot, the concession, and the total amount due for taxes, and the evidence proved that amount due. Even if the particulars provided for by sections 119 and 121 are not given, it is only an irregularity: *Cook v. Jones*, 17 Gr. 488; *Allan v. Fisher*, 13 C. P. 63. It is not necessary to distinguish between different rates on non-resident land, as they all belong to one fund: sections 214 and 222. The amendment to the Act by 55 Vict. ch. 49, sec. 20, was intended more for the benefit of the purchaser than the owner, and was intended to furnish evidence at the treasurer's office that the assessor and clerk did their

duty. It is only directory, and its omission does not pre- Argument.
judice the owner. Section 163 does not prohibit the treasurer selling when a true copy of the list is not returned under section 141. The amount of the tax was proved to be due for three years, and as the sale was openly and fairly conducted it is perfectly good: *The Bank of Toronto v. Fanning*, 18 Gr. 391.

April 3, 1895. ARMOUR, C. J. :—

The land in question, the south half of lot number 7 in the sixth concession of the township of Olden, was assessed in the years 1889, 1890 and 1891, as non-resident land, and was, I think, properly so assessed, for it could not be said that the occasional use of a small portion thereof (about four acres) by Quinn for pasturing his horses was such an occupation as made the land occupied land, within the meaning of the Consolidated Assessment Act of 1892, nor do I think that the doing of the statute labour in respect of the land for any of these years by Quinn, if it was done, compelled the assessment of the land as occupied land.

It was objected at the trial that the provisions of section 121 of the Assessment Act had not been complied with, that no such roll as is required by that section had been made out by the clerk of the township of Olden and transmitted to the treasurer of the county of Frontenac, and that, therefore, no taxes could be said to be in arrear in respect of the said land for the year 1889.

The roll made out and transmitted by the clerk of the township of Olden to the treasurer of the county of Frontenac of the lands of non-residents was produced and marked as an exhibit and it certainly does not comply with the said section; and if the provisions of the said section are imperative and not merely directory, the objection is a fatal one; for in case they are imperative, it cannot be said that any roll has been made out and transmitted as required by that section, and that consequently no taxes were properly in arrear in respect of the year 1889.

Judgment. In *Town of Trenton v. Dyer*, 21 A. R. 379, it was held
Armour, C.J. that the provisions of section 120 of the said Act were imperative, and that, although in that case the collector's roll was perfect in every particular excepting only the want of the signature of the clerk, the roll was a nullity.

In this case, therefore, following the principle of the decision in *Trenton v. Dyer*, I must hold that the provisions of section 121 of the said Act are imperative, and that the roll made and transmitted thereunder, and marked as an exhibit was a nullity.

The consequence of this holding is that no taxes were in arrear in respect of the said land for the year 1889, and so the sale was illegal.

Another objection taken at the trial to the validity of the sale was that the treasurer had proceeded to sell and sold the said land without the provisions of sections 141 and 142 of the Consolidated Assessment Act, 1892, having been complied with, no true copy of the lists returned by the assessors to the clerk having been furnished to the county treasurer certified to by the clerk under the seal of the corporation as required by section 141, and no certificate being thereto attached as required by section 142.

It seems to me that this is also a fatal objection to the validity of the sale, for I do not think that the treasurer could until after due compliance with the provisions of these sections proceed to sell or sell the said land.

The plaintiff is, therefore, entitled to a declaration that the said sale of the said land was illegal and void and to a cancellation of the deed of the said land thereunder.

The plaintiff is also entitled to the costs of this suit, but he must pay to the defendant the amount paid by him for the purchase of the said land, together with ten per cent. interest thereon from the time of the payment thereof and any taxes paid by the defendant in respect of the said land since the said purchase with interest thereon, at the said rate, from the time of the payment thereof.

[CHANCERY DIVISION.]

LANCEFIELD V. THE ANGLO-CANADIAN MUSIC PUBLISHING
ASSOCIATION (LIMITED).

Copyright—Penalty—Printing Canadian Copyright Work Abroad—Publication in Canada—Impressing thereon fact of Canadian Copyright—R. S. C. ch. 62, sec. 33.

Section 33 of the Copyright Act, R. S. C. ch. 62, does not impose the penalty mentioned therein upon the owner of a Canadian copyright in respect to a musical composition who has the work printed abroad, and inserts notification of the existence of such copyright on copies published in Canada.

IN this action the plaintiff, a public librarian residing in Hamilton, claimed \$300 under section 33 of the Copyright Act, R. S. C. ch. 62, as a penalty recoverable from the defendants under the circumstances, which are sufficiently stated in the judgment. Statement.

It may, however, be here stated that the words impressed by the defendants on the copies sold by them of the musical composition in question which were complained of were as follows:—"Canadian Copyright, Anglo-Canadian Music Pub. Ass'n. (Ltd.), Toronto, Can."

In their defence the defendants set up the copyrights of the said musical compositions granted to them under the Copyright Act, and alleged that everything done had been done under and by virtue of the rights conferred by the said copyrights, and denied that they had in any way dealt with the said composition or with the copyrights granted to them in respect thereof either unlawfully or contrary to the provisions of the Copyright Act.

Section 33 of the Copyright enacts as follows:—"Every person who has not lawfully acquired the copyright of a literary, scientific or artistic work, and who inserts in any copy thereof printed, produced, reproduced or imported, or who impresses on any such copy, that the same has been entered according to this Act, or words purporting to assert the existence of a Canadian copyright in relation thereto, shall incur a penalty not exceeding three hundred dollars.

Argument. The action was argued on admissions of facts before BOYD, C., at Toronto, on April 25th, 1895.

G. Lynch-Staunton, for the plaintiff.

Bicknell, and *H. D. Hulme*, for the defendants.

April 29th, 1895. BOYD, C. :—

This is an action for penalties under section 33 of the Copyright Act, R. S. C. ch. 62. The question between the parties is within a very narrow compass. The question is whether the penalties of section 33 of the Copyright Act are incurred, if upon copies of a musical composition which is the subject of Canadian copyright words asserting the existence of such copyright are impressed thereon—such copies being published only and not also printed in Canada. The defendants hold Canadian copyright in respect of the two musical pieces in dispute; they have had copies printed in Leipzig and in London—have imported these and publish them in Canada, with the notification thereon of Canadian copyright. The action does not attack the right to import, and there is nothing before me to shew that the importation is illegal—if such a point be material. Merely “printing” is not of itself “publication.” To obtain in the first instance copyright both printing and publishing are essential conditions precedent (sub-secs. 5, 6 and 13). It is not expressly declared that the continuance of the privilege of copyright depends upon the printing, as well as the publication of the composition in Canada. That may be inferred from certain provisions in the Act; and it may be that such importations as these are not protected by the Act; but these are not now matters for adjudication. The protection and fostering of native industry would favour such a construction, but that is not the only thing to be considered, especially in dealing with the penal clauses of this statute.

And the main difficulty arises in dealing with this penalty clause. It is directed against one who has not lawfully acquired the copyright of the work—but the defendant

is not in that position—he has Canadian copyright in the compositions. Then it provides a penalty in case one not so qualified, impresses on imported copies, words purporting to assert the existence of Canadian copyright—rather implying that if so qualified by the possession of copyright he may impress upon imported copies the fact of such copyright being in existence.

Judgment.

Boyd, C.

To give effect to the contention of the plaintiff one would need to have some such enactment as this: “Every person who has lawfully acquired the copyright, etc., who imports into Canada printed copies of the work and impresses thereon words purporting to express the existence of Canadian copyright in relation thereto shall incur a penalty of, etc.”

I have, therefore, to dismiss the action with costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE QUEEN EX REL. ST. LOUIS V. REAUME ET AL.

Quo Warranto—Election of Deputy Reeve—Irregular Addition of Names to Voters' List—Quashing Election—55 Vict. ch. 42 (O.), secs. 175 and 191.

An election, though by a majority of sixty-six votes, of deputy reeve of a municipality, who had participated in a transaction by which before polling day some eighty names were added to the voters' list over and above those certified by the Judge to be properly there, was quashed, although only some thirty-one of those illegally added cast votes, notwithstanding 55 Vict. ch. 42 (O.), sec. 175, which provides that no election shall be invalid for want of compliance with the principles of the Act when the result is not affected.

The meaning of 55 Vict. ch. 42 (O.), sec. 191, is that cases which have so much in common that they can conveniently be tried together, may be combined in one proceeding.

Statement.

THIS was an appeal by the relator to the Judge in Chambers from the judgment of his Honour C. R. Horne, the Judge of the County Court of Essex, upon the relator's application in the nature of a *quo warranto* proceeding to set aside the election of the defendants as deputy reeve and councillors respectively for the township of Sandwich East, in the county of Essex.

The County Judge had dismissed the relator's application on the ground that the irregularities complained of by him did not materially affect the result of the election, and on the ground that as Judge of the County Court or as local Judge of the High Court of Justice, he had no jurisdiction to entertain the application.(a)

The appeal was argued on March 11th, 1895, before BOYD, C., in whose judgment the facts are stated.

W. H. P. Clement, for the relator. The provisions of the Act as to voters' lists were not complied with, and the defendant knew this. The names were illegally added.

(a) On this latter point his Honour said: "I think, when the County Judge grants the *fiat*, the proceedings should be entitled in the High Court, but it is not necessary to decide on this ground, as I think, for the reasons given hereafter, the election should not be set aside."

These were not the lists contemplated by the statute, and so there was no election according to the Act. It is impossible to say how many certificated voters voted, but some did. I refer to *The Hackney Case*, 2 O'M. & H. 78; *In re the Election for Monck*, 32 U. C. R. 147; *The Salford Case*, 1 O'M. & H. 133; *Re Johnson and the County of Lambton*, 40 U. C. R. 297; The Municipal Act, R. S. O. ch. 184, secs. 128, 132, 141, 187; 52 Vict. ch. 3, sec. 17 (O.).

Aylesworth, Q. C., for the defendant. The relator was scrutineer of one of the sub-divisions, and did not object to the votes complained of. I refer to *The Monck Case*, Hodg. E. C. 154; *Prince Edward (2) Case*, *ib.* p. 160; *Monck Case*, *ib.* p. 725; *East Simcoe Case*, 1 El. Cas. 291.

March 12th, 1895. BOYD, C.:—

I think the deputy reeve should be unseated, because, although he has a majority of sixty-six votes, he participated in a transaction by which, on the Saturday before polling day, some eighty names were added to the voters' lists over and above those certified by the Judge to be properly there. This was an illegal transaction, initiated apparently by his cousin, the assessor, who was also deputy returning officer, and who it appears took an active interest in the contest in favour of his relative. The clerk of the municipality attended with his books and papers, and for two or three hours the work of addition went on, while some names were added afterwards by the returning officer. True it is, that if you judge by the marks in the polling books, only some thirty-one of those whose names were illegally added cast votes, yet I deprecate that arithmetical test as being the standard by which to judge under sec. 175 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, (O.). Having made such changes contrary to law, it became the duty of the elected candidate, who was privy to the changes, to demonstrate that the result of the election was not affected thereby, if even that peradventure would suffice to relieve from the

Argument.

Judgment.

Boyd, C.

consequences of this unwarrantable proceeding. But upon the present evidence no one can say how these names being added operated on the voting constituency. Even the returning officer, when questioned, cannot negative the injurious results. Thus, at p. 33 :—" Q. This allowing people to vote must have had a material effect upon this election ? A. Well, as far as I can see, perhaps it must have, but I don't think it would have much. Q. You can't tell how much it would have ? A. No."

It may be said also that the election was not conducted in accordance with the principles of the Act, because the whole system is based on the finality of the voters' list as settled and certified by the Judge ; but all this was disregarded by the prior addition of names from other sources and by the subsequent issuance of certificates to persons assumed to be entitled to vote, on which they were allowed to vote though their names were not on the list. The Judge below has adverted to this as a grave irregularity, which has before to some extent been practiced in this municipality, but which it is hoped will now not again be heard of. The other candidates for the council were innocent as regards the change made in the voters' lists, and their majorities run from seventy-five upwards over the next candidate, and for this reason I agree with the result of trial before the County Judge, who did not disturb them in their seats, but I cannot agree that they should have costs against this relator, who has done right in bringing the violation of the law before the Court.

Section 191 was urged as a reason for listening to no objection which was not common to all the cases, but that is merely a convenient guide for procedure, so that cases having so much in common that they can conveniently be tried together may be combined in one proceeding—with the double advantage of economy and expedition.

The relator should get half his costs, to be paid by the defendant, the deputy reeve, whose seat is declared vacant. A new election is ordered for the purpose of filling that office.

[CHANCERY DIVISION.]

IN RE UNION SCHOOL SECTION EAST AND WEST
WAWANOSH.

*Public Schools—Readjustment of Boundaries of Union School Sections—
Arbitration—Finality of Award—54 Vict. ch. 55, sec. 88 (O.).*

An award of arbitrators under secs. 87-88 of the Public Schools Act, 1891, as to readjustment of union school sections is conclusive for five years, though the award be that no change be made in the boundaries.

THIS was a case submitted to the decision of the Statement.
Chancellor, in pursuance of section 7 of the Education Department Act of 1891, 54 Vict. ch. 55 (O.).

It set out that on the petition of certain ratepayers arbitrators were appointed in 1893, by the County Council of the county of Huron, under section 88 of the Public Schools Act of 1891, 54 Vict. ch. 55 (O.), for the purpose of readjusting the boundaries of the Union school section composed of the townships of Hullett and East and West Wawanosh, in the said county; that the arbitrators so appointed made their award bearing date August 21st, 1893, and thereby determined that no action should be taken in the matter of the said petition; that the meaning of the said award was that no change should be made in the boundaries of the said Union school section; that subsequently in the year 1894, in pursuance of petitions presented by the ratepayers of the said townships, the County Council of the county of Huron again appointed arbitrators under sec. 88 of the Public Schools Act of 1891, for the purpose of readjusting the boundaries of the said Union school section, and by an award dated March 20th, 1894, the arbitrators so appointed made an award altering the boundaries of the said school section.

The question submitted was whether the award made in 1893, prevented the operation of the award of 1894, or in other words, whether the arbitrators of 1893, having decided that no change should be made in the boundaries of the Union school section could other arbitrators in

Statement. 1894, make an award changing the boundaries by such section of the Public Schools' Act.

By section 87 of the Public Schools Act of 1891, provision is made for the formation, alteration, or dissolution of the Union school sections, and by sub-section 11 of the said section of the Act it is provided that no Union school section shall be altered or dissolved for the period of five years after the award of the arbitrators has gone into operation.

The case was argued before BOYD, C., on March 13th, 1895.

J. R. Cartwright, Q. C., for the Minister of Education, cited Wheaton's Law Dictionary *sub voce* "Award," and specially referred to in secs. 81, 82, sub-secs. 3, 94, 95, sub-sec. 2 and 96, sub-sec. 3 of the Public Schools Act of 1891, and submitted that the intention was to shut the door of all disputes for a period of five years.

No one contra.

March 14th, 1895. BOYD, C.:—

I think the intention of the Act, 54 Vict. ch. 55, is to make an award dealing with the adjustment or readjustment of the boundaries of a Union school section conclusive of the question for five years after the award goes into operation. Such an award exists though the decision of the arbitrators is that no change be made in the boundaries. The award, under section 87, may be appealed and upon appeal its operation would be suspended till the appellate board of arbitrators made their award, which is to be "final and decisive." But when the final award is made and that as here (under section 88) determines that no change be made, it is not competent to reagitate the matter next year, nor is it so till five years thereafter. Expenses are incurred in these arbitrations and the policy of the Act is not to incur such expense oftener than is

necessary, nor to have such questions kept open as a matter of annual agitation. The test as to whether a change should or should not be, is not to be applied oftener than quinquennially.

Judgment.

Boyd, C.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE MARTIN.

Devolution of Estates' Act—Executors and Administrators—Registration of Caution—54 Vict. ch. 18, (O.)—56 Vict. ch. 20, (O.).

The provisions of 56 Vict. ch. 20, (O.), as to registration of caution apply to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner. By virtue of section 2, the effect of such subsequent registration would be only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purposes of administration. The provisions of 56 Vict. ch. 20, (O.) are so engrafted on 54 Vict. ch. 18 as to make both Acts apply to all persons dying after 1st July, 1886. *In re Baird*, 13 C. L. T. 277, reconsidered.

THIS was an application by the official guardian for the direction of a Judge under the following circumstances:—Absalom Martin, of the township of Woolwich, in the county of Waterloo, yeoman, died intestate on December 4th, 1887, leaving real estate. Letters of administration were issued on December 23rd, 1889. The administrator made application to the official guardian for his consent to a sale of a portion of the real estate after the expiration of the year from the death. The caution required by the Act 54 Vict. ch. 18 (O.), had not been registered, and the question was whether section 4 of 56 Vict. ch. 20 (O.), applied to the estates of persons dying before 54 Vict. ch. 18 came into force, it having been held in *Re Baird*, 13 C. L. T. 277, that that Act was not retroactive.

Statement.

J. Hoskin, Q. C., the official guardian, on March 15th, 1895, applied *ex parte* to BOYD, C., in Chambers, for a direction as to whether or not the property could now be sold by the administrator, a caution not having been filed.

Judgment. March 16th, 1895. BOYD, C. :—

Boyd, C.

The question is mooted whether the provisions in 56 Vict. ch. 20 (O.), as to registration of caution, apply to cases in which probate has not been taken or letters of administration obtained till more than a year after the death of the owner. I think the scope and language of the Act is sufficient to apply to such cases. The Act, sec. 2, provides protection for any who may acquire rights in the interim, so that the effect of a subsequent registration of caution is only to withdraw to or vest in the executor or administrator so much of the land as is properly available for the purposes of administration.

My attention has been called to a case of *Re Baird*, noted in 13 C. L. T. 277, and it appears to me on consideration that the distinction made in that decision is too subtle as between the two amending Acts as to Devolution of Estates. Granted that the Act of 1891, 54 Vict. ch. 18 (O.), was not retroactive, yet I now think that the provisions of the Act of 1893, 56 Vict. ch. 20 (O.), were so engrafted on the former Act as to make the declaration of section 4 cast back the operation of both Acts so as to apply to all persons dying after July 1st, 1886, (R. S. O. ch. 108, sec. 2).

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

McCULLOUGH ET AL. V. CLEMON.

Interest—Trade Agreement—Net Profits—Ascertainment—R. S. O. ch. 44, secs. 85, 86—Damages for Delay—Costs.

In an action brought in 1891, upon a written agreement—silent as to interest—to recover the amount of net profits of a certain business for a period ending 1st May, 1885, as ascertained in the manner provided for in the agreement, but not so ascertained until after the time fixed thereby, it was adjudged at the trial that the ascertainment was void, and a reference was directed to a Master to take an account.

Upon appeal from the report :—

Held, that the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, to ascertain which something more than an arithmetical computation was required; and therefore interest could not be allowed under sec. 86, sub-sec. 1, of the Judicature Act, R. S. O. ch. 44. *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99, and *London, Chatham, and Dover R. W. Co. v. South-Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A. C. 429, followed.

Spartali v. Constantinidi, 20 W. R. 823, considered.

Nor could interest be allowed under sec. 85, as in a case in which it had been usual for a jury to allow interest; for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or by the account taken in the action.

Smart v. Niagara and Detroit Rivers R. W. Co., 12 C. P. 404, and *Michie v. Reynolds*, 24 U. C. R. 303, distinguished.

Nor could equitable damages, in the nature of interest, for delay, be allowed to the plaintiffs, having regard to their own delay in bringing the action, and to the fact that the omission to ascertain the amount within the time fixed by the agreement was not by the fault of the defendant.

Consideration of the question of costs of the action, reference, and appeals.

MOTION by the defendant by way of appeal from a Statement. Master's report, and by the plaintiffs for judgment on further directions, heard before OSLER, J. A., in Court at Ottawa, on the 23rd April, 1895.

The facts are fully stated in the judgment.

O'Gara, Q. C., for the defendant.

Shepley, Q. C., and J. Christie, for the plaintiffs.

May 22, 1895. OSLER, J. A.:—

The only question on the appeal is whether the plaintiffs are entitled to a sum of \$295.74 allowed for interest on the amount found due on the agreement on

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which the action is brought, from the 1st May, 1885. The action was not commenced until the 30th April, 1891, when the Statute of Limitations had almost run against the claim, and it was not brought to trial until the 5th November, 1892. Some of the issues were disposed of by the trial Judge, and all other matters in dispute were referred to the Master at Ottawa. Since then the progress of the litigation has been as slow and deliberate as before, and its present stage has been reached through a series of appeals and references back, of which it is to be hoped this may be the last.

The action arises out of a trade agreement made on the 31st May, 1884, between the plaintiffs and the defendant. Both parties were dealers in coal, and, for the purpose, it is most likely, of keeping up prices, the defendant agreed that during the year commencing on the 1st May, 1884, he would sell his coal at the plaintiffs' prices; and by clause 3 "that the net profits, to be ascertained in manner hereinafter appearing, arising to him during the year's business, after deducting the sum of \$3,000, if the net profits exceeded that sum, should belong to and be the property of the plaintiffs, and should be deemed to be money to be" (*sic*) "received by the defendant for the use of the plaintiffs." If, on the other hand, the profits so ascertained were less than that sum, the plaintiffs were to pay the difference to the defendant.

The agreement contains several elaborate provisions as to the manner in which the net profits should be ascertained, which I must refer to in some detail:—

Clause 4. The said net profits shall be ascertained in manner following and not otherwise: by account to be made up on the 10th day of each month during the year commencing 1st June, 1884, and delivered to Peter Learmonth, of Ottawa, accountant, wherein shall be set down the gross number of tons of coal sold by (defendant) during the previous month, and the prices thereof as determined in the manner hereinbefore expressed. And after deducting from said prices at which said coal is sold and delivered—a num-

ber of specified deductions—the balance remaining there-
after shall be the net profits within the meaning and intent
of this agreement.

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5. The (defendant) shall on or before the 10th day of each and every month during the said year make out an account in writing of his transactions in buying and selling coal during the month previous, containing all information necessary to shew the net profits, within the meaning of this agreement, of his transactions in buying and selling coal during each of the said months, and each of the said accounts shall be verified by the statutory declaration of (defendant) or of his bookkeeper, and when so verified shall be delivered to Peter Learmonth and retained by him.

6. That on or before the 10th May, 1885, Peter Learmonth shall, from the said monthly statements or accounts, *or from any other accounts or statements of account which the said Peter Learmonth from the said (defendant) may demand*, make up and determine the total net profits of (defendant) in his (said) transactions; and, after deducting the said sum of \$3,000, if the said net profits exceed that sum, determine the amount or balance which shall remain due and owing by (defendant) to (plaintiffs), and if the said total sum or net profits do not amount to or exceed the said sum of \$3,000, then shall determine the sum by which they fall short of it, which last mentioned sum of money shall be payable, forthwith after said determination by said Peter Learmonth, by the (plaintiffs) to the (defendant).

Then there is a clause, No. 8, which provides that if any difference or dispute shall arise between the parties touching the amount of the net profits arising from the purchase and sale of coal by defendant during the continuance of the agreement, or touching the amount to be paid by either party to the other according to the terms of the agreement, or touching the construction of the agreement, the difference shall be referred to Learmonth, whose decision shall be final.

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The defendant carried on his business under this agreement for the year mentioned therein, and from time to time delivered the monthly account or statement, verified as required, to Learmonth, who therefrom made up a statement shewing that the net profits of the business amounted to \$3,581, and that the sum of \$581 was payable by the defendant to the plaintiffs. To recover that sum this action was brought.

The defendant pleaded that the agreement was illegal, and set up many objections to the award or determination of Learmonth—*inter alia*, that it was not made until after the 10th May, 1885, which was the date stipulated by the agreement on or before which it should be made, and that it had been made in defendant's absence without giving him an opportunity of adducing evidence before the arbitrator as to the accounts and respecting other matters in difference between the parties respecting the same period.

The learned Chief Justice who tried the action held that the agreement was not illegal, but that the award was void, on the ground, as stated to me on the argument, that it had not been made until after the 10th May, 1885. Something was also said as to the monthly statement being merely approximate, and that both parties charged errors therein. The judgment ordered that the defendant should account to the plaintiffs "for the net profits arising under the agreement sued on, for the period and in the manner and subject to the terms and conditions in the said agreement mentioned and set out, and that for these purposes it be referred to W. M. Matheson, Esquire, one of the Masters of the Supreme Court of Judicature at Ottawa." Further directions and the whole of the costs of the action, as well before as after the hearing, were reserved.

It does not appear that either of the parties had attempted to avail themselves of the 8th clause of the agreement, providing for a reference of their disputes to Learmonth, whose award, if such it could be called, had been made under the 6th clause, by taking the result of the totals of the defendant's monthly statements.

The consequence of the setting aside the Learmonth award was that the case went into the Master's office to have an account of the year's business taken at large, which turned out to be a peculiarly troublesome and difficult piece of work, largely owing, it appears, to the loss or suppression of some of his books by the defendant and the mutilation of others.

Master Matheson's report was made on the 29th December, 1893. He found that the surplus profits over \$3,000 of the whole year's business, after allowing all deductions authorized by the agreement, proved before him, was \$706.68. To this he added interest at six per cent. from the 1st May, 1885, \$367.47: in all \$1,074.15. In arriving at this result, the Master disallowed to the defendant a charge of \$362.10 for weighing coal delivered by him, as not sufficiently proved.

In April, 1894, the report was sent back to the Master to reconsider and review it with reference to the mode of proving the plaintiffs' surcharge. Master Matheson resigned his office without having made a final report, and an order was made directing the reference to be proceeded with before Master and Referee Cassels, whose report, dated 2nd March, 1895, is now in question. In the meantime an order had been made giving the defendant leave, subject to objection, to adduce further evidence in respect of the charges for weighing which had been disallowed in the former report. On the final reference the sum of \$262.90 was allowed for these charges, and the amount found due to the plaintiffs for net profits on the year's business over \$3,000, was found to be \$501.11. On this sum the Master, following the former Master's ruling, allowed interest from the 2nd May, 1885, to the 2nd March, 1895, equal to \$295.74.

It is unfortunate that the plaintiffs' right to interest on the amount found due was not disposed of on the appeal from the former report, instead of being left open to be the subject of another appeal. The only notice taken of this and other questions then raised on points on which

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the Master had ruled, and on which he would have to rule again, was that the Court did not think fit to make any order in respect of them.

The question then is whether under our statute, or under any equitable principle or practice applied in reference to a claim like that sued for in this action, the plaintiffs are entitled to recover interest. Our Act of 7 Wm. IV. ch. 3, sec. 20, is taken, with a slight difference, which I shall presently refer to, from the Imperial Act 3 & 4 Wm. IV. ch. 42, secs. 28 and 29, commonly called Lord Tenterden's Act. It is now found, with some verbal changes and a rearrangement of the language, in the Ontario Judicature Act, secs. 85, 86, and 87. As there was no demand of payment before action, we have not to consider the 2nd sub-section of sec. 86; and sec. 87 deals with the allowance of interest in certain special actions, of which this is not one, so that the plaintiffs must bring themselves within sec. 85 or the 1st sub-section of sec. 86. Section 85 enacts that: "Interest shall be payable in all cases in which it is now payable by law, *or in which it has been usual for a jury to allow it:*" and sec. 86, sub-sec. 1, enacts that: "On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable."

The words above placed in italics are peculiar to our Act. Subject to what I shall have to say as to them, the principles of construction and the application of the statute and the general law as to the right to recover interest are very fully expounded in the recent case of *London, Chatham, and Dover R. W. Co. v. South Eastern R. W. Co.*, in the Court of Appeal, [1892] 1 Ch. 120, and in the House of Lords, [1893] A. C. 429.

In the case at bar there is no express contract to pay interest, nor can a contract be implied from the mode of dealing of the parties. The case is not one in which "by law," apart from the statute, interest is demandable,

and therefore it does not come within the first branch of sec. 85. The plaintiffs, however, contend that it is recoverable either under the latter branch of that section, as in a case "in which it has been usual for a jury to allow interest," or else under the 1st sub-section of sec. 86, as upon a debt or sum certain, payable by virtue of a written instrument at a certain time.

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Dealing first with sec. 86. The cases are conflicting as to the meaning of these words, "debt or sum certain," payable at "a certain time," but the law must now be taken to be as laid down by the Court of Appeal in the above case, following *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. Exch. Ch. 99, that "the Act requires that the contract shall ascertain the sum and the time; the certainty of both must appear from the contract. But still if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient:" per Lindley, L. J., [1892] 1 Ch. at p. 144.

Do the plaintiffs bring themselves within this proposition?

The agreement provides that the amount of the surplus net profits shall be ascertained as of the 1st May, 1885, by Learmonth, and, as it must now be held, on or before the 10th May, 1885, from the monthly statements which were required to be furnished by the defendant; and if he had so ascertained the amount payable as such surplus net profits, there can be no question but that the plaintiffs would have been entitled to interest thereon from that time. That was a mode of arriving at the amount payable, and there could in that case have been no difficulty in holding that there was a sum certain payable at a time certain, viz., by the award. If, however, that mode of computation is departed from, what certainty remains either as to the amount payable or the time of payment? The parties were not satisfied with what Learmonth had done. The defendant, at all events, was not, and he suc-

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ceeded in satisfying the trial Judge that he ought not to be bound by it, and the award, so to call it, was set aside. The agreement provided for another mode of ascertaining what was due by either party to the other, namely, by a formal reference to the arbitration of Learmonth, which was quite a different thing from his merely computing the amount from the monthly statements. That mode was not adopted, for some unexplained reason, and if it had been, the amount payable under the agreement and the time of payment would have been rendered certain only by the award, for making which no time is limited by the agreement. It was open to either party to have gone to arbitration at any time during the nearly six years which elapsed after the termination of the agreement before action, but neither party did so, the consequence being that it became necessary to determine their disputes by an action. In that event the time of payment could not, in my opinion, be said to arrive until the final decision of the issues raised in the action, and how far the plaintiffs' demand was from being a sum certain, ascertainable by a mere arithmetical computation, may be seen by the different accounts made up and rendered by the defendant, and the varying results arrived at in the Learmonth award, and the two reports which have been made in the action.

Much reliance was placed by the plaintiffs on the case of *Spartali v. Constantinidi*, 20 W. R. 823 (1872), as warranting the allowance of interest even on such a state of facts as existed here. In view of later authorities, I think it does not assist the plaintiffs. Moreover, it appears to have been compromised between the parties pending an appeal: 21 W. R. 116. With it may be compared the cases of *Dinham v. Bradford*, L. R. 5 Ch. 519; *Rish-ton v. Grissell*, L. R. 10 Eq. 393.

It is impossible to apply the maxim *id certum est quod certum reddi potest*, where the defendant's liability for any sum whatever depends upon taking the account of the year's business, involving an enormous number of different items of different kinds, both of deductions and

debits. Even the monthly statements to be dealt with by Learmonth were not final, as the 6th clause enabled him to call for further accounts and statements, from all of which he would have to ascertain how the balance stood. It might have been in favour of one party or in favour of the other, and this alone shews how impossible it is to say that by the agreement, whether by computation or otherwise, there appears a certain sum payable, which was due absolutely and in all events from the one to the other.

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J.A.

Stress was laid upon the 3rd clause of the agreement, which provides that the net profits payable to the plaintiffs shall be deemed to be moneys had and received by defendant to the plaintiffs' use. But this still leaves open the question as to the amount and the time of payment, once their mere ascertainment, by means of Learmonth's computation from the monthly statements, is abandoned.

The plaintiffs, therefore, in my opinion, are not entitled to interest under sec. 86.

Then as to sec. 85. It is not easy, I confess, to understand exactly what is meant by the expression "cases in which it has been usual for a jury to allow interest," having regard to the conditions specified in sec. 86 in which a plaintiff is to be entitled to interest on a debt or sum certain. It may be that it was intended to adopt the law laid down in such cases as *Arnott v. Redfern*, 3 Bing. 353, and *Eddowes v. Hopkins*, 1 Doug. 376, as against the narrower view expressed by Lord Tenterden in *Higgins v. Sargent*, 2 B. & C. 348, and *Page v. Newman*, 9 B. & C. 378, which latter is said in *London, Chatham, and Dover R. W. Co. v. South Eastern R. W. Co.*, [1892] 1 Ch. 120; [1893] A. C. 429, to be that which was adopted by the Imperial Act, and which has in England been followed ever since. I doubt very much, however, if we should be justified in so limiting the scope of the 86th section, as we should do if we adopted as a general rule that laid down in the earlier cases, and I am satisfied that the 85th section cannot be so extended as to include a case like the present. It applies rather to claims like that in question in *Smart v.*

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Osler,
J.A.

Niagara and Detroit Rivers R. W. Co., 12 C. P. 404 (1862), which was an action for the balance of an account for work and labour—a liquidated demand, as the Court described it—on which, by the special indorsement on the writ of summons, interest was claimed. Draper, C. J., said: “It has become so settled a practice to allow interest on all accounts after the proper time of payment has gone by, and particularly upon the balance of an account which imports that the accounts on each side are made up and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special indorsement.” The judgment goes on to suggest that the question might still be open upon a writ of error. But in the subsequent case of *Michie v. Reynolds*, 24 U. C. R. 303 (1865), which was an action against the sheriff and his sureties for default of the former in not paying over, after demand and after the sheriff had been ruled to return the writ, moneys which he had levied under an execution, and where the trial Judge had ordered interest on the amount claimed, the same learned Chief Justice said: “If the question of interest had been left to the jury, we have no doubt they would have given it to the plaintiffs, considering that the sheriff had retained the proceeds of the executions so long. It has been the practice for a very long time to leave it to the discretion of the jury to give interest where the payment of a just debt has been withheld.” See also *Spence v. Hector*, 24 U. C. R. 277.

Claims like these, or a claim upon an account stated, as in *Blaney v. Hendricks*, 2 W. Bl. 781; 3 Wils. 205—in short, liquidated demands—may well be thought to come within this section, but it cannot, in my opinion, be held to extend to a case like the present, where no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or, in default of that, by means of the account taken in the action.

The plaintiffs lastly contended that they were equitably entitled to damages in the nature of interest to be given for the delay in payment. This might have been con-

ceded on the principle explained in *London, Chatham, and Dover R. W. Co. v. South Eastern R. W. Co.*, by the Court of Appeal, [1892] 1 Ch. 120, had the omission of Learmonth to make his award or computation under the 6th clause of the agreement, from the monthly statements, been shewn to be attributable to the misconduct, delay, or default of the defendant. But this has not been done, and the result of his omission was that it became necessary to ascertain the amount due, or whether anything was due, either by arbitration under the 8th clause or by action. It is impossible to treat the money that has thus been shewn to be due for surplus net profits as a debt that was payable on the 1st May, 1885, so as to warrant the Court in giving interest for its detention. Nor, indeed, is the justice of the claim for interest apparent, considering the delay in bringing the action.

Judgment.

Osler,
J.A.

The defendant's appeal from the report as to the item of interest—and no other has been on this occasion disputed—must be allowed.

On the motion for judgment the plaintiffs proposed to argue that the evidence on which the Master had in his report allowed the defendant the item of \$262.90 for the city charges for weighing coal delivered out by him, ought to have been rejected. This is one of the deductions specified in the agreement to be taken into account in ascertaining the net profits, but in the first report it was disallowed on the ground that it had not been proved. Leave was then given by the order of the 15th June, 1894, to introduce the evidence on the reference back "without prejudice to the right of the opposite party to object, when the matter again comes before the Court, that such evidence was not properly received at this stage." The result was that the evidence was given and the Master has found the item, to the above amount, proved. Why the question whether or not this indulgence should be extended to the defendant was not finally decided when it first came before the Court, it is impossible to say, as all the facts on which it depended were then before the Court. But hav-

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ing been admitted, and the Master having acted upon it, it is difficult now to deal with it as on the original motion, though that may be what was contemplated by the order. I think the proper way to have raised the objection was by appeal from the report, and, as that has not been done, I cannot now give effect to it. Indeed, as the Master has acted upon the evidence, and has been satisfied with it, my impression is that, even if the objection could be considered as still open under the order of the 15th June, I would not allow it.

The plaintiffs, therefore, must have judgment for the amount found due by the report less the sum allowed by the Master for interest and without adding the amount allowed to the defendant for the weighing charges, in all \$501.11, with interest from 23rd March, 1895.

The costs of the action and proceedings therein remain to be determined. The plaintiffs are entitled to the general costs of the cause before and subsequent to the hearing, including the costs of the reference throughout. The costs of the applications on which the orders of 6th June and 20th September were made are disposed of in the plaintiffs' favour by those orders. Those of the order of the 15th June, permitting the defendant to give further evidence in the matter of the weighing charges, were reserved to be disposed of on further directions. I think the plaintiffs should have those costs as costs occasioned by an indulgence granted to the defendant. The costs of the order of the 7th April, reversing the Master's ruling on what seems to me a very technical objection to the mode of proving items of the surcharge, were not disposed of by that order, but "reserved to be disposed of on a further appeal," and liberty was thereby given to both parties to give such further evidence as they might be advised. The defendant's appeal on which that order was made embraced a large number of objections which were not disposed of, and have not, except as to the item of interest, been renewed. I do not see my way to give the plaintiffs the

costs of that appeal, but I do not think I should give them to the defendant, whose conduct in not keeping and rendering the accounts which he ought to have kept and rendered under his agreement, has made this action necessary. Further, in determining whether he is entitled to any special consideration in the matter of costs, it is impossible to overlook the special findings in the report that he produced no cash-book, or journal, or blotter, or book shewing the amount of coal purchased, and that, although a ledger was originally produced before the Master at the beginning of the reference, it subsequently disappeared before any investigation could be made on the reference into the defendant's business, or the items set forth by him in his account filed on the 2nd October, 1893, as an exhibit to his affidavit; also, that the order-book contained only partial entries, and that the stub delivery book was produced in an extensively mutilated condition; that the defendant and his manager failed to satisfactorily account for this state of things; and that it had thereby become impossible to arrive at any certain conclusion from the books of the defendant with respect to his business for the year in question.

Judgment.

Osler,
J.A.

Taking everything into consideration, I make no order as to the costs of the present appeal, and give the plaintiffs the costs of an unopposed motion for judgment.

See *Geake v. Ross*, 52 L. T. N. S. 666; *Hill v. South Staffordshire R. W. Co.*, L. R. 18 Eq. 154; *Rodger v. Comptoir D'Escompte de Paris*, L. R. 3 P. C. 465; *Ward v. Eyre*, 15 Ch. D. 130; *Webster v. British Empire Mutual Life Assurance Co.*, *ib.* 169; *Rhymney R. W. Co. v. Rhymney Ins. Co.*, 25 Q. B. D. 146; *Ridley v. Sexton*, 18 Gr. 580; 19 Gr. 146.

E. B. B.

[QUEEN'S BENCH DIVISION.]

IN RE HODGINS AND THE CORPORATION OF THE CITY
OF TORONTO.

Municipal Corporations—Construction of Sidewalk—“Desirable in the Public Interest”—Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 623b.

Persons who will be affected by proceedings under section 623b of the Consolidated Municipal Act, 1892, for the construction of sidewalks, are entitled to actual notice thereof, and to be permitted to shew, if they can, that the proposed sidewalk is not desirable in the public interest; and where such notice had not been given, except by advertisement in a newspaper, which had not come to the attention of the applicant, the by-law for the construction of the sidewalk was quashed, so far as it purported to affect his property.

Statement. THIS was a motion to quash certain parts of by-law No. 3,239, of the city of Toronto, passed April 9th, 1894.

The by-law in question recited that the corporation had constructed certain plank sidewalks in the city set forth in the schedule attached to the by-law, each of which sidewalks had cost the sum set forth in the schedule, and proceeded to authorize the issue of local improvement debentures by the city to pay for them, and to levy a rate upon the assessable real property fronting or abutting upon the streets or places whereon or wherein the said sidewalks had been respectively constructed during two years, sufficient to pay the debentures and interest. There was no recital in the by-law of any petition for it, and counsel for the city supported it as having been passed under the authority of section 623b of the Consolidated Municipal Act of 1892, 55 Vict. ch. 42. There was no recital in the by-law that two-thirds of the members of the council present at any regular meeting of the city or town council were of opinion that the sidewalks in question were desirable in the public interest, but an affidavit of the secretary of the committee on works stated that on June 6th, 1892, at a meeting of the city council it was unanimously resolved that the sidewalks in question were in the opinion of the

council desirable in the public interest. No notice of the intention to pass such a resolution or to consider the question appeared to have been given save by advertisement in a newspaper which had not come to the attention of the applicant. Counsel for the city admitted that the by-law could not be supported under section 617 of the Municipal Act of 1892, but only if at all under section 623*b* of that Act. Statement.

The motion was argued on February 15th, 1895, before STREET, J.

The applicant appeared in person.
Caswell, for the city.

April 18th, 1895. STREET, J. :—

It is expressly admitted by counsel for the city that the work here in question was undertaken under sec. 623*b* of the Municipal Act of 1892, and not under section 617, and that the notices required for a work under the latter section were not given. The by-law must, therefore, it was further admitted, stand or fall under the provisions of section 623*b*.

That section provides that notwithstanding anything contained in the preceding fourteen sections of the Act the corporation may construct a plank sidewalk along any street: and that the cost of doing so may be assessed against the abutting properties, if such sidewalk, in the opinion of two-thirds of the members present at a regular meeting of the council, is desirable in the public interest.

It is necessary, therefore, that the council should consider and determine whether or not the sidewalk is one which is desirable in the public interest before the property abutting on it can be charged with its cost. If they should determine that it is desirable in the public interest there is no appeal from their decision and the property becomes liable for the charge if they choose to impose it.

Judgment.

Street, J.

The determination of this question is clearly a judicial act, and before a conclusion is reached upon it the persons affected by it should have notice that it is under consideration and be permitted to shew if they can that the proposed sidewalk is not desirable in the public interest: *In re Hammersmith Rent Charge*, 4 Ex. 87; *Bain v. City of Montreal*, 8 S. C. R. 252, 302; *The Queen v. The Cheshire Lines Committee*, L. R. 8 Q. B. 344; *Capel v. Child*, 2 C. & J. 558; *Nicholls v. Cumming*, 1 S. C. R. 395.

In the present case the applicant knew nothing whatever of the proceedings of the council until he was called upon to pay the assessment made against his property for the cost of the sidewalk which had been built. It appears that a notice of the intention of the council to lay the sidewalk in question was published in an evening paper in the city with the intimation that the cost would be charged against the properties abutting on it, but this notice never came before the applicant, and if he was entitled to notice, as I think he was, he is in the absence of some provision to the contrary entitled to actual notice.

For these reasons I am of opinion that the by-law attacked, in so far as it purports to affect the property of the applicant, must be quashed, and I so order.

A. H. F. L.

[CHANCERY DIVISION.]

TAYLOR V. REGIS.

Evidence—Corroboration—Two Defendants in Same Interest—R. S. O. ch. 61, sec. 10—R. S. O. ch. 1, sec. 8, sub-sec. 24.

In an action by an executor of a deceased mortgagee against two joint mortgagors, both the latter deposed to certain payments made by one or the other in the lifetime of the mortgagee :—

Held, that each mortgagor was an opposite or interested party in the same degree and of the same kind, and constituted together an opposite or interested party within the meaning of the section, and the fact of both the mortgagors testifying to such payments did not constitute corroboration within the meaning of R. S. O. ch. 61, sec. 10.

THIS was an appeal from the report of the Master in Statement. London in a mortgage action, in connection with matters stated in the judgment.

The appeal was argued before OSLER, J. A., at London, on April 9th, 1895.

H. B. Elliot, for the defendants, appellants.

A. Stuart, for the plaintiff.

April 13th, 1895. OSLER, J. A. :—

The action is by the executor of a deceased mortgagee against the two mortgagors, who both depose to certain payments made on the mortgage in question during the lifetime of the mortgagee. It is not stated by whom these payments were made, but I infer that they were made by one or other of the mortgagors, each of whom gave testimony as to all of such payments. The plaintiff disputes the payments, and the question is whether the evidence of the defendants is corroborated within the meaning of the statute R. S. O. ch. 61, sec. 10, which enacts that “in any action by the executor of a deceased person an opposite or interested party to the action shall not obtain a verdict, judgment or decision on his own evidence, unless

Judgment.

**Osler,
J.A.**

such evidence is corroborated by some other material evidence." The learned Master has held that the evidence is not sufficiently corroborated, and I think he is right. What is a discharge of one defendant is a discharge of the other. Each is an opposite or interested party of the same kind and in the same degree, and they are together an opposite or interested party within the meaning of the section: Interpretation Act, R. S. O. ch. 1, sec. 8 (24). The entries in the defendant's book of account carry the matter no further. The case being one of some importance to the defendants, and, so far as I know, new in its circumstances, I have looked again at the authorities, but find nothing in them which aids their contention. The appeal must therefore be dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE GRANT.

Life Insurance—R. S. O. ch. 136, sec. 6—51 Vict. ch. 22, sec. 3 (O.)—53 Vict. ch. 39, sec. 6 (O.)—58 Vict. ch. 34, sec. 12 (O.)—*Terms of Policy*—*Variance by Will*—*Apportionment*.

THIS case came on by way of appeal to the Divisional Statement. Court, by the executors, from the judgment of ARMOUR, C. J., reported *ante* p. 120, and was argued on May 27, 1895, before BOYD, C., and MEREDITH, J., by the same counsel, when the widow consented that the fund should remain in Court and be administered for the benefit of the children on whose behalf the executors were claiming. The Court after drawing attention to the policy of the late Act 58 Vict. ch. 34, sec. 12 (O.), by which the insured is granted power to dispose of the insurance money by will in as full and ample a manner as he could by other instrument, declined to make any order by which the executors could obtain the fund, and without any decision on the merits dismissed the appeal without costs. Leave to appeal was refused.

G. A B.

[COMMON PLEAS DIVISION.]

REGINA V. HUGHES.

Justice of the Peace—Jurisdiction—Trespass—Railway—Arrest—51 Vict. ch. 29, sec. 283 (D.)

Section 283 of the Railway Act of Canada, 51 Vict. ch. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned.

Statement.

ON February 9, 1895, *DuVernet* obtained a rule *nisi* to quash a summary conviction of the defendant by a justice of the peace in and for the county of York "for that he, the said Edward Hughes, did on the 7th day of July, 1894, unlawfully trespass on the track of the Grand Trunk Railway Company of Canada, between Queen street and Pape avenue, in or near the city of Toronto, contravening the Railway Act of Canada, 1888, section 273."

Section 273 of the Railway Act of Canada, 51 Vict. ch. 29, provides: "Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars."

Section 283—"Any such constable" (railway constable) "may take such persons as are punishable by summary conviction for any offence against the provisions of this Act, or any of the Acts or by-laws affecting the railway, before any justice or justices appointed for any county, city, town, parish, district or other local jurisdiction within which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the persons taken within the limits of his own local jurisdiction."

The main ground of objection to the conviction was want of jurisdiction on the part of the justice, owing to the

offence having been committed within the city of Toronto, for which there is a police magistrate. Statement.

It was shewn that the defendant was not arrested and brought before the justice, but was summoned.

May 25, 1895. *DuVernet* moved the rule absolute before a Court composed of MEREDITH, C. J., and ROSE, J. *Aylesworth*, Q. C., shewed cause.

June 29, 1895. ROSE, J. :—

By consent of counsel the only questions submitted to us were: (1) Whether a justice of the peace for the county of York has jurisdiction under sec. 283 of the Railway Act, 51 Vict. ch. 29 (D.), to try outside of the city of Toronto a person charged with having walked along the track of the railway within the city, in contravention of the provisions of sec. 273 of the same Act. (2) If he has such jurisdiction in any case, whether it is not confined to cases where the offender is brought before him in custody.

I am of the opinion that sec. 283 applies only where the constable arrests an offender and takes him before the justice of the peace.

The language is: "Any such constable may *take* such persons * * before any justice or justices appointed for any county * * within which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the persons *taken* within the limits of his own local jurisdiction."

The word "taken" evidently is synonymous with "apprehended," and we find it so used in the forms; and the word "take" would not be applicable to the case of a person summoned to appear, for he would not be taken, but would appear or attend.

We find the word "take" used in sec. 566 of the Criminal Code, with reference to a person who had been "apprehended." See also Form "O" in schedule 1 to the same Act, where it means "arrest," or "apprehend."

Judgment.

Rose, J.

I the more readily come to this conclusion as it seems to me that the provisions of sec. 283 were made to meet the case of a person arrested upon a train—or by the servants of a railway company while engaged on a moving train—and where, in the very necessity of the case, it might be impracticable to take the offender before a magistrate having local jurisdiction.

Such necessity would not arise where an information was laid upon which a summons or warrant might issue. In such a case probably the usual procedure must be followed. This in some cases would be convenient and in others not.

No good reason appeared to us on the argument why the prosecution in this and other similar cases was not before the police magistrate for the city. For all that appears it would have been more convenient.

The conviction must be quashed, but, under the circumstances appearing on the argument, without costs, and with the usual order of protection.

MEREDITH, C. J., concurred.

E. B. B.

[CHANCERY DIVISION.]

JANES V. O'KEEFFE.

Landlord and Tenant—Covenant to Pay Taxes—Construction of—Right of Building over Lane—Interest in Land.

A lessee covenanted, pursuant to the Short Form of Leases Act, to pay all taxes "to be charged upon the said demised premises or upon the said lessor on account thereof." The premises consisted of a building with a lane to the rear, described as being "north of the premises hereby demised" over which the lease provided that the lessee might at any time erect a building or extension provided the same was always nine feet above the ground, and in accordance with which the lane was built over. The lease also provided that if the lessors elected not to renew, they were to pay a fair valuation for the buildings, which should at that time be erected "on the lands and premises hereby demised and over the said lane":—

Held, that the words "demised premises" in the covenant referred only to the building lot itself, and not to the interest in the lane which passed by the lease.

Seemle, where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or that of the landlord to resort to the Court of Revision to have the omission rectified would not relieve him from his obligation.

Held, also, that the interest of the defendants in the lane was clearly an interest in land.

And *seemle*, even if it were not separately assessable, this would not excuse defendants from repaying the lessor what he had had to pay for taxes in respect to it.

THIS was an action for breach of the covenant for pay- Statement.
ment of taxes contained in a lease.

The circumstances of the case are fully set out in the judgment.

The action was tried before MEREDITH, C. J., at the non-jury sittings at Toronto, on March 27th and 28th, 1895.

Johnston, Q. C., and *N. F. Davidson*, for the plaintiff.

Moss, Q. C., and *Lockhart Gordon*, for the defendants.

April 9th, 1895. MEREDITH, C. J.:—

The plaintiff sues for breach of a covenant contained in a lease from the trustees of the Dennis estate, his predecessors in title, to the defendants, dated February 2nd

Judgment. 1880, made in pursuance of the Act respecting Short
Meredith, Forms of Leases, by which the defendants covenanted for
C.J. the payment of taxes in the statutory words, "and to pay taxes."

The extended form contained in the Act is in these words, "and also will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises or upon the said lessor on account thereof."

The taxes in respect of which the claim is made are the municipal taxes (including school rates) for the years 1889 to 1893, both inclusive).

By the lease the lessor demises and leases to the lessees a parcel of land having a frontage of 14 feet 7 inches on Yonge street and a depth of 100 feet, the north boundary of which is described as "a lane," together with full privilege and power to the said lessees, their executors, administrators and assigns, in any manner they shall see best, and at any and all times during the continuance of the term or terms hereby granted, and at any and all times during any further term or renewal to be hereafter granted under and by virtue of these presents, to build or extend any building over the lane *to the north of the premises hereby demised*, so as such buildings or extensions is or are always nine feet above the level of Yonge street aforesaid."

The *habendum* is "to have and to hold the said demised premises."

The lease contains a covenant for renewal by which the lessor covenants and agrees to make "a new and fresh lease of the land and premises hereby demised "for a further term of twenty-one years with and subject to the like covenants, provisos and agreements as are herein contained," with a proviso that if the lessor elects not to renew he is to pay to the lessees "a fair valuation of the buildings and improvements which shall at that time be erected and made *on the lands and premises hereby demised and over the said lane.*"

The lease also contains a proviso for re-entry on non-payment of rent or nonperformance of covenants, and a covenant by the lessors for quiet enjoyment, both in the statutory words.

Judgment.

Meredith,
C.J.

The lane is $7\frac{1}{2}$ feet wide and about 100 feet in depth, and is vested in the plaintiff, subject to the defendants' rights in or in respect of it, and to certain rights of way over it, and is made use of as a means of access to the lands in the rear of the lot, of which the lane forms part. It has been built over by the lessees or their predecessors in title (the lease in question being a renewal of a former lease), and the building over the lane is used in connection with the building erected on the 14 feet 7 inches as an hotel, and is sub-let by the defendants to a tenant of theirs.

The defendants, or their tenants, have been assessed in each of the years before mentioned for the building only where it is erected or extended over the lane, and have not been assessed for the land or for any interest in it, but the land has been assessed either to the plaintiff or to other persons, some of whom had an interest in it previous to the plaintiff having acquired it, but others of whom, so far as appears, were strangers to the title.

The taxes having been in arrear for these years and the land being liable to be sold, the plaintiff paid the arrears, and he now claims from the defendants a portion of the taxes bearing the same proportion to the whole of the arrears as the value of the interest of the defendants in the land forming the lane bears to the whole value of the land.

It was contended by the defendants that inasmuch as the plaintiff had not availed himself of the opportunity which the Assessment Act afforded, of having the tenants of the property assessed in respect of their interest in the lane, he was concluded by the assessment roll as finally revised.

There are, however, in my opinion, several answers to that contention. If, as was held by the Court of Appeal

Judgment. in *The Toronto Street R. W. Co. v. Fleming*, 37 U. C. R.
Meredith, 116, and as was contended by the defendants' counsel, the
C.J. interest of the defendants in the lane was not liable to
assessment, it was not possible for the plaintiff to have
procured the interest of the defendants to be separately
assessed, and it is difficult to see why the impossibility of
assessing that interest should be an answer to the plain-
tiff's claim that the defendants should repay him what he,
having been assessed for the land, has had to pay for taxes
upon it, so far as respects the interest of the defendants
in the land, if the covenant of the defendants embraces the
taxes on their interest in the lane; but even if the defen-
dants' interest were separately assessable, I do not think
that the omission of the plaintiff to avail himself of the
provisions of the Act to have it so assessed would afford any
answer to his claim. The roll as finally revised is no
doubt made binding upon all parties concerned, but that,
as it appears to me, must be only as between them and the
municipality, and for the acquiring of any right which
depends upon any fact or state of things to be established
by the assessment or the assessment roll and cannot extend
to defeat a right depending upon contract such as the
covenant here, where, even had an appeal to the Court of
Revision been had, it would not have relieved the plaintiff
from his liability to be assessed as owner, or the land itself
from the lien created by the statute for the taxes imposed
upon it. I cannot think that in the ordinary case of a
tenancy where the tenant agrees to pay the taxes on the
land demised to him, the omission of the assessor to enter
his name in the assessment roll or that of the landlord to
resort to the Court of Revision to have the omission recti-
fied, would be any answer to the claim of the latter that
the tenant should indemnify him against the payment of
the taxes, and if not in that case, I can see no reason for
any difference in the rights and liabilities of the parties
where the tenant's interest is such as that which the
defendants have under the lease in question.

The interest of the defendants in the lane is, in my

opinion, clearly an interest in land. As was said by Alderson, B., in *Electric Telegraph Co. v. Overseers of Salford*, 11 Ex., at page 187: "Suppose a building was erected in the air across a street, could there be a doubt that, though it was in the air as a house, the land was occupied?"

Judgment.
Meredith,
C.J.

If, therefore, the words of the defendants' covenant are wide enough to include the interest in the lane as part of the demised premises, the plaintiff is, in my opinion, entitled to recover. If it be not so, then had the plaintiff also demised the land below where the defendants are entitled to build over, to a tenant who agreed to pay the taxes on the lands demised to him, the plaintiff would be in the position of having rented the whole of his land to tenants who had agreed to pay the taxes upon it and yet, according to the defendants' contention, these separate interests not being separately assessable, the plaintiff must pay the taxes himself and would have no right to call upon either of his tenants to repay them.

There remains to be considered the question of the construction to be placed on the covenant sued on. Unless the instrument in which the covenant is contained indicates that the parties have used the words "demised premises," in a restricted sense, I am of opinion that the obligation of the lessee is to pay the taxes not only upon the 14-foot 7-inch parcel, but also in respect of the interest in the lane which passes to him by the lease: *Saylor v. Cooper*, 2 O. R. 398, S. C. 8 A. R. 707; *Perry v. Davis*, 3 C. B. N. S. 769. But I have come to the conclusion that the lease does indicate that the words descriptive of the property, the taxes upon or in respect of which the lessees were to pay, were used in a restricted sense, and that they were used as applicable to the 14-foot 7-inch parcel only, and do not include the interest in the lane, the right to build over which, it gave to the lessees. The lane is spoken of as being "north of the premises hereby demised," and in the provision for compensating the lessees for the buildings and improvements in the event of the lessors electing not to renew the

Judgment.
Meredith,
C.J.

lease the lessors are to pay "the amount of a fair valuation of the buildings and improvements which shall at that time be erected and made on the lands and premises hereby demised and over the said lane." This language, it appears to me, indicates that the parties intended that the words "demised premises" when used in the covenant to pay taxes should be taken to have reference to the 14-foot 7-inch parcel only, and not to the interest in the lane which passed by the lease.

The action of the plaintiff must therefore be dismissed with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

PARKES

V.

THE TRUSTS CORPORATION OF ONTARIO ET AL.

Will—Executory Devise—Happening of Event—Vested Estate.

A testator devised a farm to his executors in trust for his grandson, with power to sell and apply the proceeds for his benefit: and in case he died before attaining twenty-one they were to transfer the land or, if sold, the balance of the proceeds to his father. The father died before his son, who died before attaining twenty-one, without issue. The land was not sold:—

Held, that the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, which had become impossible, and that his estate had become absolute.

Statement.

THIS was an action for the construction of the second clause of the will of one Elhanan Parkes, which, with the necessary facts, is set out in the judgment, and came up on motion for judgment on March 21st, 1895, before FERGUSON, J.

E. P. McNeill, for the plaintiff, the surviving executrix.

Biggar, Q. C., for the Trusts Corporation, who claimed as administrators of the estates of both Francis Sidney

Parkes Smith (grandson), and Robert Smith (grandson's father), deceased. The whole will must be looked at, and it shews that by the different clauses and bequests the testator, who had a wife, daughter and grandson, the son of a deceased daughter, intended to make fair provision for them all, and as the two daughters were to be treated in the same way, the grandson got his mother's share. His estate was an equitable one, the legal estate being in the executors. If they sold the land, the money was to take its place. If he died before attaining twenty-one, his father was entitled, shewing an intended benefit for that daughter's branch, viz., her son and husband. The estate was vested in the grandson, merely the possession postponed: *Theobald on Wills*, 3rd ed. 377, 386; *Phipp's v. Ackers*, 9 Cl. & Fin. 583; *Boraston's Case*, 3 Rep. (19a), p. 57.

Shepley, Q. C., for the surviving daughter. I look at the whole will with a different result. The surviving daughter and wife were to get everything but the bequest to the grandson, which was small and specific; the daughter was really a residuary legatee, by reason of being heiress of her father. The land was not directly devised to the grandson, but vested in trustees. His father having died before him, can never take now, and so drops out of the trust, and as the estate vested in the grandson can never be divested in accordance with the terms of the will on his death before twenty-one; there is an intestacy and a reverter.

Biggar, Q. C., in reply, referred to *Jarman on Wills*, 5th ed. 826; *Jackson v. Noble*, 2 Keen 590; *Potts v. Atherton*, 28 L. J. N. S. Ch. 486; *Marcon v. Alling*, 5 Gr. 562.

May 4th, 1895. FERGUSON, J. :—

This is a motion for judgment. The case is upon the pleadings. The matter for determination is the construction of the second clause or paragraph of the last will of

Judgment. the late Elhanan Parkes. It is conceded that the other
Ferguson, J. clauses of the will are not, nor is the codicil material in considering what is the true construction and meaning of this second clause or paragraph. The will bears date the 27th day of November, 1876. The testator died on the 31st day of August, 1877.

The second clause of the will (the only one in question here) is as follows:—

“2nd. I give and devise to my executors, to be hereinafter named, in trust for my grandson, Francis Sidney Parkes Smith, all and singular the south half of lot number eight, in the fifth concession of the township of Grantham, aforesaid, containing by admeasurement fifty acres, be the same more or less. And I hereby authorize my said executors, hereinafter named, to sell the said lands herein devised to them in trust for my said grandson, if they should deem it best, and apply the proceeds of such sale to the benefit of my said grandson, Francis Sidney Parkes Smith, in such manner as they may think proper. And in case my said grandson should die before he reaches his twenty-first year of age, I hereby authorize my said executors to convey the said lands to my son-in-law, Robert Smith, the father of my said grandson, or if the same be then sold, to pay to him, my said son-in-law, the proceeds of such sale or so much thereof as may then remain unappropriated, as hereinbefore directed.”

The testator's son-in-law, the said Robert Smith, was one of the executors named in the will, and immediately after the death of the testator, he assumed the management of this farm, making considerable improvements upon it and applied the income derived from it to the maintenance of the said Francis Sidney Parkes Smith.

On or about the 29th day of May, 1894, the said Robert Smith and Francis Sidney Parkes Smith, were accidentally killed, Robert Smith dying a few hours before Francis Sidney Parkes Smith.

I am asked to say who is entitled to the land, this not having been sold by the executors.

The grandson of the testator (Francis Sidney Parkes ^{Judgment.} Smith), was, at the time of his death, a little under twenty ^{Ferguson, J.} years of age, had never married, and left no issue.

As I glean from the arguments, the contention arises mainly, if not entirely, from or by reason of the fact that Robert Smith did not survive his son, the said Francis Sidney Parkes Smith. If he had survived his son, it was not contended that the executory gift, the gift over, would not have taken effect, or that in such case Robert Smith would not have become entitled to a conveyance of this land.

There are not, as will be observed, words of limitation, in the gift over in favour of Robert Smith. It is simply in his favour, without more.

It seems plain, that the grandson, Francis Sidney Parkes Smith, took, by this devise, a vested interest, but an interest capable of being divested. In the case *Phipps v. Ackers*, 9 Cl. & Fin., at p. 592, the principle is laid down, that the subsequent gift over in the event of the devisee dying before attaining twenty-one, sufficiently shews the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, subject only to the chance of its being divested on a future contingency, and the same principle is referred to in the third edition of Theobald on Wills, at p. 377. There are other reasons for saying that this grandson took a vested interest. *Phipps v. Ackers*, and other cases and authorities shew that what he took was, in equity, an estate in fee simple in the land, subject to be divested upon the happening of the event mentioned, and the "gift over" taking effect.

This "gift over" is an executory devise, an interest which, according to its nature, springs up of its own inherent strength upon the arrival of the time and the happening of the event mentioned without waiting for the determination of any prior interest, and it not unfrequently annihilates all interests that appear to be in its way.

Judgment. The question now arises as to whether or not Robert
Ferguson, J. Smith having died during the lifetime of his son Francis
Sidney Parkes Smith, the devise or gift over to him
(Robert Smith) took or can take effect so as to divest the
estate in fee in the son Francis Sidney Parkes Smith?

With the best consideration I have been able to give this clause of the will, I am of the opinion that the gift over to Robert Smith was to take effect only in the event of the son Frances Sidney Parkes Smith dying before attaining the age of twenty-one during the lifetime of Robert Smith, and assuming this to be the proper view, the case *Jackson v. Noble*, 2 Keen, at p. 597, referred to in the fifth edition of Jarman on Wills, at p. 826, is a clear authority for saying that the contingent executory gift, this gift over to Robert Smith, does not and cannot take effect, and that the estate in fee vested in the son Francis Sidney Parkes Smith, was not and cannot now be divested. Where there has been a prior vested gift and then a clause divesting the gift on certain contingencies expressed, the Court has never been found to divest that gift, unless the precise contingency referred to should occur: *Potts v. Atherton*, 28 L. T. N. S. Ch., at p. 488.

I am of the opinion that the estate in fee vested in Francis Sidney Parkes Smith was not divested, and that it cannot now become divested by reason of the gift over, and is an estate absolute in fee to which the proper heirs or representatives of Francis Sidney Parkes Smith are entitled, and there will be judgment and a declaration accordingly.

The costs of all parties will be paid out of the rents, profits, or other proceeds of this parcel of land; the corporation and plaintiff to have trustees' costs.

G. A. B.

[CHANCERY DIVISION.]

IN RE FLETCHER'S ESTATE.

Devolution of Estates Act—Executors and Administrators—Sale of Infants' Lands—Consent of Official Guardian—R. S. O. ch. 108, sec. 8, subsec. 1—54 Vict. ch. 18, sec. 2 (O.).

Under 54 Vict. ch. 18, sec. 2 (O.), the approval of the official guardian to a sale of land by executors or administrators is now required only where the sale is for the purpose of distribution simply, and then only where there are infants interested, or heirs or devisees who do not concur.

Where administrators in contracting to sell lands under circumstances not requiring the consent of the official guardian, nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout with good faith and to the best of their judgment :—

Held, that they were not liable to make good to the estate the deficiency resulting from a resale.

Under the above Acts, executors and administrators are not, in all respects, in the same position as a trustee for sale of lands. Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events.

Semble, where the approval of the official guardian is not required, notice need not be given to him under Rule 1005.

THESE were various appeals from the report of the Statement.
Master in London in administration proceedings, and were made in connection with matters and under circumstances set out in the judgment.

The appeals were argued before OSLER, J. A., on April 9th, 1895, at London.

C. S. Leitch, for the plaintiff.

F. P. Betts, representing the official guardian, for the infant defendant.

T. Macbeth, for the defendant Malcolm Fletcher.

E. Flock, for the defendant John Tolman.

The following authorities were cited on the argument :
Chisholm v. Barnard, 10 Gr. 479 ; *In re Mallandine*, 10 C. L. T. 226 ; *In re Koch and Wideman*, 25 O. R. 262 ; *Re Woodhall, Garbutt v. Hewson*, 2 O. R. 456 ; *Morgan and Wurtzburg on Costs*, pp. 178, 184.

Judgment. April 21st, 1895. OSLER, J. A. :—

Osler,
J.A.

Appeals from the Master's Report by the plaintiff and by the infant defendant and by the defendant Malcolm Fletcher.

The plaintiff is the widow of the late Dugald Fletcher, deceased, who died intestate; the infant defendant is his daughter, and the other defendants are his administrators. The report was made on a reference under an administration judgment. The appeals of the plaintiff and the infant may be regarded as one, being on the same grounds and concerning the same matters. The appeal of the defendant Malcolm Fletcher, is as to the disallowance of an item of \$30 paid by the administrators as a year's interest on a sum of \$500 lent to the deceased by one McLellan. It was disallowed as being a voluntary payment, the interest not being legally due or payable. I see no reason, however, why, if by the agreement of the parties interest was intended to be paid on the loan from the time it was made, as all parties conceded and as was proved, it should not be paid merely because the note taken by the lender, payable at one year from date, was not drawn up payable with interest. The evidence seemed quite sufficient to warrant the note being reformed, and on that ground, if on no other, the payment is to be justified and the executors to be credited with it on account. The question of varying a written instrument by parol does not really arise. I allowed this appeal on the argument and merely repeat my reasons for doing so. The case of *Harvey v. The Bank of Hamilton*, 16 S. C. R. 714, may be referred to.

As to the plaintiffs and infant's appeal; one of the objects of this appeal is to charge the administrators with a sum of \$783, which, as it is alleged, has been lost to the estate by their negligence in dealing with the land, a sale of which at \$6,650 they lost and the land was afterwards sold by the Court under the consolidated rules relating to infant estates (12 Vict. ch. 72) for the sum of \$5,867.

The Master reported that the administrators offered the

real estate for sale on March 17th, 1892. It was bought by one Allan McLean for \$6,650, and a written contract was duly entered into by him expressed to be subject to the approval of the official guardian as required by the Devolution of Estates' Act.

Judgment.

Osler,
J.A.

The time fixed for delivery of possession was April 1st, 1892, the balance of purchase money to be paid April 17th. The first intimation the official guardian had of the sale was on April 13th by the letter of the vendors' solicitor of April 12th, no notice of the intention of the administrators to sell having been given under Consolidated Rule 1005. After the sale a verbal offer for the land was made by one Archibald Fletcher, a brother of Malcolm Fletcher, for \$6,750, *i. e.*, \$100 more than McLean offered, and the official guardian was informed of this by the letter of April 12th above mentioned. It was not, however, stated that the offer was a verbal one.

The official guardian refused to approve of the sale. In September of the same year McLean again offered to buy the land at the price formerly offered, provided an allowance for the season's rent were made to him. This offer was refused. In April, 1893, the land was sold under an order of Court in a proceeding under the Act for the sale of infants' estates, for \$5,867.

On the argument of the appeal the correspondence between the solicitor for the administrators and the official guardian was read. In his letter to the former of April 13th, 1892, the official guardian points out that no steps should have been taken in the direction of a sale of the realty without first communicating with him, and that he would have to be satisfied that it was a proper case in which to sell, and that the proper procedure had been adopted. He refers also to the fact of the matter having become complicated by the subsequent offer. On April 15th the solicitor for the administrator replied, stating that the land had been offered for sale "more for the purpose of ascertaining what could be got for it;" that the \$100 offered since the sale was "by one of the family, who does

Judgment.

Osler,
J.A.

not wish the land to pass out of the family. We may miss both offers unless one of them get in to put in a spring crop." He adds that ample evidence can be furnished that the price was more than a fair one, and that some of the land must be sold, as there was not enough otherwise to pay the debts. He urged for an answer, so that he might be in a position to put the purchaser in possession. The official guardian replied on April 16th, referring to his former letter, saying that the matter "seemed to be in a mess," and expressing his reluctance to interfere. "If you can get the question as to who is the purchaser disposed of, and of course the purchase money will have to include the additional \$100, then I will try to carry out the matter. If you cannot adjust this difficulty, then you will have to apply to a Judge in Chambers any Monday and get his direction. If you are obliged to adopt this course because of the snarl, write to your agent and I will tell him what to do." Then the official guardian points out what information should be furnished to him—state of the family, value of real and personal estate, affidavit as to debts, affidavit of valuator as to value of real estate. "All this is subject to your being able to settle the matter between the conflicting purchasers. I shall be glad to do what I can to help you, but you can readily understand that I cannot be expected to make the difficulty my own."

The next letter from the administrators' solicitor is on November 9th. He says, "the snarl has been got rid of by the purchaser withdrawing from the contract." Then further correspondence ensues, with the view, it would seem, of effecting a sale under the Infants' Estate Act.

No steps were ever taken to carry out the sale of March 17th, after the receipt of the official guardian's letter of April 16th.

The Master found that the personal estate of the intestate come to the hands of the administrators was \$2,443.64, with which they were chargeable, and that they were entitled to be allowed thereon \$2,355.41, leaving a balance

due by them to the extent of \$88.23, which has been reduced by the allowance of the appeal of Malcolm Fletcher to \$30.23.

Judgment.

Osler,
J.A.

In the evidence of John Johnson, the other administrator, it is stated that Malcolm Fletcher "took possession" of the contract (the McLean contract) for the purpose of sending it to Mr. John Cameron (the solicitor of the estate) to send to the official guardian, and that Fletcher had told him on March 31st that he (Fletcher) had withheld the contract from the guardian to give his brother Archy a chance. Archibald Fletcher was the person who offered the additional \$100. It does not appear, however, how the "withholding" of the contract affected the proceedings.

The contention of the appellants is that the administrators are simply in the position of an ordinary trustee who has negligently lost an advantageous sale of the realty which has subsequently been disposed of in a declining market: or that if there was no duty cast upon them primarily to sell, yet, that having interfered and attempted to sell, they were bound to carry the matter through, and must be fixed with the loss for negligence in not having done so.

The Devolution of Estates Act R. S. O. ch. 108, introduced a new rule of succession to real estate. All such property as is mentioned in section 3 of the Act is by section 4, upon the death of the owner, notwithstanding any testamentary disposition, to devolve upon and become vested in his legal personal representatives subject to the payment of his debts; and, so far as it has not been disposed of by some act of the deceased, is to be distributed as personal property not so disposed of is to be distributed.

Subject to the provisions of sections 4 to 8 the legal personal representatives of the deceased are, by section 9, declared to have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of the Act with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were personal property vested in them.

Judgment.

Osler,
J.A.

The only one of these sections I need to refer to is section 8 (1): "Where infants are concerned in real estate which but for the preceding sections of this Act would not devolve on executors or administrators, no sale or conveyance shall be valid under the Act without the written consent or approval of the official guardian of infants, appointed under the Judicature Act, or, in the absence of such consent or approval, without an order of the High Court.

Consolidated Rule 1005 enacts that before the administrator takes proceedings under the Act for the sale of real estate in which infants are interested he shall give the official guardian notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice.

Then by 54 Vict. ch. 18, (1891), an Act respecting the sale of real estate by executors and administrators, it is enacted (section 2) that executors and administrators in whom the real estate of a decedent is vested under the Devolution of Estates Act, shall be deemed to have as full power to sell and convey such real estate for the purpose not only of paying debts, but also of distributing and dividing the estate among the parties beneficially entitled whether there are debts or not, as they have in regard to personal estate; provided, that where infants are entitled and there are no debts, no such sale shall be valid as respects such infants unless the sale is made with the approval of the official guardian, etc.

It is singular that this section is not expressed to be in substitution or amendment of section 8 (1) of the former Act. That section is not indeed referred to, although the two are undoubtedly inconsistent, as the latter required the assent of the official guardian in all cases where infants were interested.

The effect of section 2 of the Act of 1891, is to vest in the executors and administrators, whether there are infants or not, an absolute discretion to sell the real estate for the purpose of paying the debts; and, whether there are debts or not, for the purpose also of the distribution of the

estate among the persons beneficially entitled. Differing from section 8 (1) of the Devolution of Estates Act, the approval of the official guardian is now required only in the case of a sale for the purpose of distribution, simply, and then only when there happen to be infants or non-concurring heirs or devisees. The power to obtain in such case an order of the High Court approving the sale, failing the consent or approval of the official guardian, is not conferred by this section.

Judgment.

Osler,
J.A.

Under these Acts, as it appears to me, executors and administrators are not in all respects in the same position as trustees for sale of the lands. Upon the latter is cast a duty to sell and dispose of them; upon the former a mere discretion, to be exercised only for certain purposes and in certain events. In the present case it seems doubtful whether they could have sold for the purpose of distribution merely, unless the widow's right to dower made her a person beneficially entitled, because there was but one heir, the infant plaintiff, who was entitled to the whole subject to the widow's dower. But as there were in fact debts, they might have sold the land, as and when they attempted to do so, although it might not have been known whether in the result it would be necessary to resort to the proceeds for the purpose of paying debts. And they might in such case also have sold, as I construe section 2 of the Act of 1891, without the assent or approval of the official guardian and probably without even notice to him under rule 1005, a rule which was passed before that Act, and must be confined to those cases in which the approval of the guardian is necessary.

They could not under the circumstances have been charged with negligence for making no attempt to sell at all, and the question is whether they ought to be so charged for not carrying out a sale which they did attempt to make, but expressly subject to the approval and consent of the official guardian. It was not negligent, though it may have been unnecessary, to take that precaution or to make that condition with the purchaser, and having made

Judgment.

Osler,
J.A.

it, and the Master having found that the active administrator, Malcolm Fletcher (the other not interfering), had acted with good faith and to the best of his judgment, I am of opinion that they are protected thereby, the official guardian not having in fact approved of the sale, and it being impossible to say whether he would have done so on the whole of the facts relating to the estate being brought to his notice. He might not improbably have said on the affidavit as to debts of the estate and the value of the personalty being produced, that the sale of the land was unnecessary, as in fact it now appears to have been, and though the additional \$100 purchase money was by a verbal offer, it might have confirmed the view that the sale was imprudent. I have examined all the authorities cited by Mr. Betts, but I do not deduce therefrom any rule which would fix persons in the peculiar position of these defendants with negligence under all the circumstances.

The appeals of the plaintiff and of the infant defendant must therefore be dismissed, and this leaves to be disposed of only the question of the commission of the administrators and the costs of the parties.

As to the former, while I entirely agree with the learned Master as to the amount, \$150, which he has thought proper under the circumstances, there is no fund out of which I ought to order it to be paid. I am not disposed to direct it to be paid out of the proceeds of the real estate sold under the Infants Act and Rule 972, even if I have the power to do so. I think the administrators may fairly be left to take the consequences of not having pressed the matter of the contract to a conclusion. Had they done so there might, perhaps, have been a fund out of which they could be paid, had the official guardian assented to the sale.

And as to the costs. I am clear that this is a case in which each party ought to bear his own, except that the plaintiff must pay the infants' costs. The plaintiff, on the one hand, has failed in the main object of the suit—

the attempt to charge the administrators with the loss on the sale. Apart from that, the correspondence between the solicitors of the parties and the official guardian leads me to the conclusion that the suit was a wholly unnecessary one. On the other hand the conduct of the defendants, though they are exonerated from the charge of negligence, was certainly such as to invite litigation, and therefore I think they should not have costs.

Judgment.

Osler,
J.A.

So far as the appeal of the defendant Malcolm is concerned, it can hardly be said to have added to the costs, but any costs to which he might otherwise have been entitled may be looked at as set against the costs of his dilatory proceedings in the Master's office in the matter of filing his accounts. I make no order as to the costs of this appeal.

A. H. F. L.

[CHANCERY DIVISION.]

McSLOY v. SMITH.

Distress—Impounding—Cattle Straying from One Enclosure into Another
—“*Running at Large*”—*Pound-keeper—R. S. O. ch. 195.*

The effect of sections 2, 3, 6, 20 and 21 of the Act respecting pounds, R. S. O. ch. 195, is to give a right to impound cattle trespassing and doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damages can be obtained by the impounding, whatever may be done in an action of trespass.

Cattle feeding in the owner's enclosure, or shut up in his stables, cannot be held to be running at large when they may happen to escape from such stable or enclosure into the neighbouring grounds.

Ives v. Hitchcock, Drap. R., p. 247, commented on.

Statement. THIS was an action of replevin brought by the plaintiff Patrick McSloy against Isaac B. Smith and David Young. The plaintiff in his statement of claim alleged that he owned and was seized in fee of part of lot No. 1 in the eleventh concession of the township of South Norwich, and that the defendant Young resided on part of the same lot adjoining the plaintiff's lands; that in the month of October, 1894, the plaintiff's cattle were pasturing in or upon a certain field or close, being part of his said lands and immediately adjoining the land upon which the defendant Young resided. The plaintiff then set up an agreement by which the defendant Young was to build and repair the whole of the dividing fence between the plaintiff's lot and the land upon which the defendant resided, and that the defendant Young would assume all responsibility of the plaintiff's cattle straying in or upon the lands occupied by the defendant Young while they were pasturing in or upon the said lot; and further, that the defendant Young agreed to maintain and keep the said fence in repair while the plaintiff's cattle were pasturing on said lot during the fall season of that year. The plaintiff further set up that subsequently, the cattle having strayed upon the defendant Young's lands, the defendant Young unlawfully and improperly distrained and im-

pounded the said cattle and put them into the possession of the said defendant Smith, who was the pound-keeper for the said township of South Norwich. The defendants denied the allegations contained in the plaintiff's statement of claim, and set up that the plaintiff was responsible for the fence, and that the fence was made of insufficient and improper material, and that it was his fault that the cattle went upon the defendant Young's lands, that the cattle had destroyed the grass and crops of the defendant Young and that he had impounded them as a distress for such damage and delivered them to the defendant Smith, who was then a pound-keeper duly appointed. The defendant Young denied the agreement set up by the plaintiff, and further set up that the matters in dispute in this suit were referred to arbitrators, and that the plaintiff was ordered by them to pay damages amounting to \$5.00, the costs of the arbitration and the costs of the defendant Isaac B. Smith. Statement.

At the trial, which took place before BOYD, C., without a jury, at Simcoe, on April 3rd, 1895, the defendant Young on cross-examination admitted that he had always looked after the fence dividing the two properties in question and that he considered it his duty to repair the same. The defendants put in an award of the fence viewers, which found the fence not to be a lawful one.*

* The award was as follows :

SOUTH NORWICH, October 16th, 1894.

To J. B. Smith, Pound-keeper :

We, the fence viewers of the township of South Norwich, having been nominated to view and arbitrate upon damages done by cattle owned by Patrick McSloy, of the township of Windham.

Said cattle were pastured on a part of lot 1, con. 11, in the township of South Norwich and owned by Patrick McSloy; said cattle broke through a line fence between David Young and said Patrick McSloy and damaged corn to the amount of \$5, the cattle consisting of one two year old bull and two steers and four heifers. Said cattle broke through an unlawful fence. Said cattle are now impounded on the premises of J. B. Smith, pound-keeper, and we the fence viewers of South Norwich, award that Patrick McSloy pay the damages, five dollars, and six dollars cost of fence viewers.

Argument. *DuVernet* and *Kelly*, for the plaintiff. Young's duty was to keep this fence up : *Ives v. Hitchcock*, Drap. 247. If there is no lawful fence you cannot impound : *Buist v. McCombe*, 8 A. R. 598 ; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274 ; *Rourke v. Mosey*, 36 U. C. R. 546. The by-law of the township as to running at large, ousts the statute : Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 490 ; R. S. O. ch. 215, secs. 1, 2, and 3. The right to impound can arise only by virtue of a law, and not by parties agreeing to keep up the fence. We do not claim damages or costs against the pound-keeper, but we could not replevy unless we made him a party.

Ball, Q. C., for the defendants. The agreement to keep up the fence is not proved. The by-law does not supersede the Act : R. S. O. ch. 215, sec. 2. The Act and by-law are to go together. Both the plaintiff and defendant were satisfied with the fence. The pound-keeper holds *in custodia legis* : *Ibbottson v. Henry*, 8 O. R. 625.

April 5th, 1895. BOYD, C. :—

The law laid down in *Ives v. Hitchcock*, Drap. R., at p. 257, does not appear applicable to the present time, because of the changes made in the terms of the statute as to impounding. At that time (1830) the statute limited the right to impound in the case of animals allowed to be at large to cases in which they broke through a lawful and sufficient fence. That clause in the statute has now disappeared and there seems to be the right to impound cattle trespassing and doing damage, but with this condition that if it is found that the fence broken is not a lawful fence, then no damages can be obtained by the impounding, whatever may be done in an action of trespass. The law is by no means clear in the revised statute, but that is the best meaning I can gather from a consideration of R. S. O. ch. 195, secs. 2, 3, 6, 20 and 21.

The rule of common law remains as enunciated in the first section if cattle stray from the highway and get into

private land and do damage, irrespective of the question of fencing, unless the local authorities choose to displace or vary this liability by by-law: see *Crowe v. Steeper*, 46 U. C. R., at p. 92.

Judgment.

Boyd, C.

The by-law in this township does not extend to the case of the cattle now in question for they were not "running at large," in the sense of the statute. I agree with the opinion expressed by Macaulay, J., in the case from Draper's Reports, at p. 259: "I cannot admit that cattle feeding in the owner's enclosure or shut up in his stable could be held running at large within the meaning of the usage and the law, whenever they might happen to escape from such stable or enclosure into the neighbouring grounds."

Apart from evidence of agreement as to the fences, I should say there was the right on the part of the defendant Young to impound these cattle as trespassing upon and damaging his field and crops, but in the absence of a lawful fence that he could not impound so as to hold for the amount of damage done. Here the fence viewers decided that the fence was not a lawful one and by the terms both of the by-law, section 8, and of the statute, section 4, the finding of a lawful fence was a condition precedent to the appraisalment of any damages by them.

The award, therefore, is invalid as to damages, and I do not see on what is before me how it can be supported as to the charge of six dollars for their fees. Section 20 refers to their lawful fees and charges, but gives no amount, while the by-law limits them to fifty cents which each shall receive for his services so rendered in the premises.

The action is replevin and the land-owner Young pleads the right to detain under the award, which cannot, I think, be supported: *Sibbald v. Roderick*, 11 A. & E. 38. The other defendant Smith, justifies as a pound-keeper who was merely discharging his duty as a public officer. This is, I think, a correct view of his relation to the case; he did nothing illegal, and upon the authorities the action fails as to him: *Wardell v. Chisholm*, 9 C. P. 125; *Ibbottson v. Henry*, 8 O. R. 625.

Judgment.

Boyd, C.

Judgment therefore for the plaintiff as against Young, with costs and two dollars damages, as no special defence was proved; and as to the defendant Smith, he is dismissed with costs to be paid by the plaintiff.

As to the disputed fact about the agreement, I may say (if the case turned upon that) I am not satisfied that the plaintiff has proved enough to cast the responsibility as to cattle and fence upon the defendant Young at the time the breach occurred.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA EX REL. THORNTON V. DEWAR.

Municipal Corporations—Municipal Elections—Bribery—Agents—Quo Warranto—Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.) secs. 209-13.

A person cannot be found guilty of bribery under secs. 209-13 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), unless the evidence discloses in him an intention to commit the offence. A candidate desiring and intending to have a pure election cannot be made a *quasi* criminal by the act of an agent who, without the knowledge or desire of the principal, violates the statute to advance the election of such candidate.

Municipal elections are not avoided for bribery of agents without authority where the candidate has a majority of votes cast.

Statement.

THIS was an appeal from the decision in favour of the defendant in *quo warranto* proceedings brought for the purpose of unseating George Dewar, who had been elected mayor of the town of Essex at the elections in that municipality held on January 7th, 1895, upon the ground of corrupt practices at the said elections. (a)

The circumstances of the case sufficiently appear in the judgment.

The appeal was argued on May 7th, 1895, before ROSE, J.

(a) The corrupt acts proved were committed by four several agents of the defendant, and were (1) the gift of a suit of clothes to a voter four days before his election; (2) the payment of \$10 to a voter for a vote; (3) the payment of \$1 to a voter for his vote; (4) intimidating an elector to vote by threatening him with imprisonment if he did not.

Wallace Nesbitt and *Sicklesteel*, for the relator, referred to The Consolidated Municipal Act of 1892, 55 Vict. ch. 42, secs. 146, 175, 187, 209-10, and 213; R. S. O. ch. 9, sec. 162; Rule 846; *Reg. ex rel. St. Louis v. Reaume*, 26 O. R. 460; Harr. Municipal Manual, 5th ed., p. 155. Argument.

Aylesworth, Q. C., for the defendant, referred to R. S. O. ch. 9, secs. 151, 162, and 164; *The Cornwall Case*, Hodg. Elec. Cas. 547; *Reg. ex rel. Johns v. Stewart*, 16 O. R. 583; Consolidated Municipal Act, 55 Vict. ch. 42, secs. 81 and 105a; he pointed out that the Municipal Act has no section corresponding to section 162 of The Ontario Election Act, R. S. O. ch. 9.

May 8th, 1895. ROSE, J. :—

In my opinion no one can be found guilty of bribery under sections 209-213 of the Consolidated Municipal Act, 55 Vict. ch. 42, unless the evidence discloses in him an intention to commit the offence and I decline to hold that a candidate desiring and intending to have a pure election can be made a *quasi* criminal by the act of an agent who without the knowledge or desire of the principal violates the statute to advance the election of such candidate. The acts which were relied upon here to shew bribery by the candidate were in no sense brought home to him personally. It was not shewn that they were done with his knowledge or consent, or under instructions which either expressly or impliedly warranted any such misconduct even if the evidence established it against persons who were in a general sense agents of the candidate. It would shock our sense of justice to be told that where a candidate had conducted the election contest with every endeavour to avoid any and all acts of impropriety he could be found guilty of bribery—be made liable to a penalty and rendered ineligible as a candidate at any municipal election for two years because some agent, acting to advance his interests as a candidate, should without his knowledge or consent, and possibly in direct opposition to his express orders, have paid a man to vote for him.

Judgment.

Rose, J.

It was said that the learned Judge Gowan of the county of Simcoe, in *Booth v. Sutherland*, 10 U. C. L. J. N. S. 287, held in accordance with the contention made by the relator's counsel. Perusal of the decision shews that the question of knowledge or want of knowledge on the part of the candidate was not discussed, but that on the finding of fact that the candidate has been guilty of bribery indirectly by an agent, he was rendered ineligible for re-election, and this is nothing more than stating the result in the language of the statute.

It was further said that the learned author of Harrison's Municipal Manual had read such decision as establishing the law as contended for, but I do not so read it: see p. 164 of the 5th ed. It is true that it is there said that "it may be that in such a case the seat will be lost to the candidate," but no ground is stated for such suggestion. In *Regina ex rel. McKeon v. Hogg*, 15 U. C. R., at p. 143, Robinson, C. J., says: "Our statutes do not, that we can find, make any express provisions to repress bribery at municipal elections in imitation of those made in England by 5 & 6 Wm. IV. ch. 76. It would no doubt be an indictable offence."

In 1872 by ch. 36 of the 35 Vict., the Legislature introduced provisions somewhat similar to those of sections 54, 55, 56, of the 5 & 6 Will. IV. ch. 76. In 35 Vict. ch. 36, by sec. 7, it was provided that "the vote of every person found guilty upon any trial or enquiry as to the validity of the election or by-law of a violation of either of the first two sections of this Act shall be void." These sections declared certain acts to be bribery, but when the Ballot Act was passed, ch. 28 of 38 Vict. (O.), providing for secrecy in municipal elections, this section as re-enacted in 36 Vict. ch. 48, sec. 158, was superseded, and is so marked in Appendix B. of R. S. O. 1877, p. 2420, and no means exist to ascertain the effect of bribery upon the result.

Thus, apparently, it was not intended that in municipal elections the election should be declared void by reason of acts of bribery by agents where the candidate was not

personally guilty of such acts, and had the majority of
+ votes legally cast, but the agents were made liable to be
punished for their misconduct as provided by section 214.
My learned brother Street in *Regina ex rel. Johns v. Stewart*,
16 O. R. 583, seems to have thought personal misconduct
on the part of the candidate essential to support a charge
of bribery against him. I may point out that the provi-
sion in section 7 of 35 Vict. ch. 36, above set out as to bri-
bery making void a vote as far as relates to voting on
by-laws, is retained in the Municipal Act; see R. S. O. ch.
184, section 335.

Judgment.

Rose, J.

It was said that the candidate had urged certain per-
sons to vote knowing that they had no right to vote. There
is no section in the Municipal Act similar to sec. 162 of ch. 9,
R. S. O. 1887, and even if there was such a section, I see
no evidence upon which could be based a finding that the
candidate knowing as a matter of fact and law, that cer-
tain persons had no right to vote, induced or procured
them to vote at the election.

As to the unfolding and refolding of ballot papers by a
deputy returning officer so as to exhibit his initials, the
learned Judge has acquitted such returning officer of all
intentional misconduct, and has in effect found that the
irregularity, if any, did not affect the result of the election.
As not more than twenty ballots were thus treated, and
the majority was thirty-nine, I cannot see how I could in-
terfere even if—and I do not say it was so—the result
of the irregularity was that such ballot papers became
“spoiled” papers.

I would hesitate long before avoiding an election be-
cause an official had unwittingly been guilty of an irregu-
larity over which the candidate had no control unless it
was manifest that the result had been affected by such act.

The appeal must be dismissed with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

RE MCFARLANE V. MILLER ET AL.

Statutes—Drainage and Watercourses Act, 1894—57 Vict. ch. 55, sec. 22, sub-sec. 6 (O.)—R. S. O. ch. 220, sec. 11, sub-sec. 5—Directory.

The provisions of sub-sec. 6 of sec. 22 of 57 Vict. ch. 55 (O.) the Ditches and Watercourses Act, 1894, which require the Judge of the County Court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory.

Statement. THIS was an appeal from a judgment of ROBERTSON, J., dismissing an application for a writ of prohibition to restrain one Mary McFarlane and the County Court Judge of the county of Oxford from proceeding with an appeal against an award in a matter under the Ditches and Watercourses Act, 1894, 57 Vict. ch. 55 (O.)

An award had been made, dated July 31st, 1894, under section 16 of the Act, by one F. J. Ure, an engineer appointed under section 4, and filed with the clerk of the municipality on August 1st, 1894, under section 18. Notice of appeal, dated August 11th, was given by Mary McFarlane, and the clerk received it on August 13th, and immediately transmitted it, with the necessary papers, to the Judge, who received them about August 15th. Nothing further was done until October 12th, when the Judge appointed November 7th for the hearing of the appeal, on the return of which appointment the engineer appeared and contended that the award had become absolute, as the appeal had not been heard and determined by the Judge within two months from the receipt of the notice from the clerk, under sec. 22, sub-sec. 6.

The appointment was then adjourned until November 23rd, when the same objection was renewed by counsel for certain other parties, non-appellants, but was overruled by the Judge, who proceeded with the appeal, and some time in January, 1895, gave judgment and referred the award back to have certain alterations made.

An application was then made for a writ of prohibition, which was argued on March 29th, 1895, before ROBERTSON, J., who dismissed it with costs.

From this judgment an appeal was had to the Divisional Court, and was argued on May 22nd, 1895, before ROSE and FALCONBRIDGE, JJ. Argument.

F. R. Ball, Q.C., for the appeal. The Judge *must* hear and determine the appeal within the two months. The word "shall" used in sub-sec. 6 of sec. 22, 57 Vict. ch. 55 (O.), is imperative, without any limitation. Under the first Ontario Interpretation Act, 31 Vict. ch. 1, sec. 6, there was the qualification, "Unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction": section 6. That section was held by Chief Justice Moss to be exceedingly elastic: *Re Lincoln Election*, 2 A. R., at p. 341. The Legislature recognizing this, have changed it since, both in R. S. O. (1877) sec. 8, and R. S. O. (1887) sec. 8, and omitted the limitation, leaving the word "shall" distinctly imperative. Besides, R. S. O. ch. 220, sec. 11, sub-sec. 5, although it limits the time within which the appeal is to be heard and determined, provides that it may be heard after the time: and as that is omitted in the present statute, 57 Vict. ch. 55, sec. 22, sub-sec. 6, where the time is extended from one month to two months, it must be assumed the Legislature considered two months long enough under any circumstances. This is not a judicial proceeding, and the Judge does not sit as a Judge, and he must comply with the Act: *Re Pacquette*, 11 P. R. 463; *Gibbons v. Chadwick*, 12 C. L. T. Occ. N. 207. The Court will grant prohibition after a judgment has been obtained if there is a want of jurisdiction: *Robertson v. Cornwell*, 7 P. R. 297; *In re Brazill, v. Johns*, 24 O. R. 209.

A. Bicknell, contra. The dissatisfied party here has done all she could by appealing within fifteen days, under sec. 22, sub-sec. 1; and serving the clerk with notice; sub-section 2. She had no control over the Judge, whose duty is prescribed by sub-section 6, and his default (if any) should not affect her rights. There was no duty on

Argument. the party, it was on the Judge: Maxwell on the Interpretation of Statutes, 1st ed., 337. The word "shall" here is not imperative, merely directory: *In re Ronald and the Village of Brussels*, 9 P. R. 232; *Town of Trenton v. Dyer*, 21 A. R., at p. 381; *Re Lincoln Election*, 2 A. R. 324; *The Queen v. The Mayor, etc., of Rochester*, 27 L. J. Q. B. 45; Dwarrris on Statutes (Potter) 221, 222, 224; Endlich on the Interpretation of Statutes, par. 436; Harcastle's Construction of Statutes, 2nd ed., 121.

Bull, Q. C., in reply. Our present Interpretation Act must govern. English cases are not in point, because in them the word "shall" is varied according to circumstances as in our original Act, 31 Vict. ch. 1, sec. 6.

May 27th, 1895. ROSE, J.:—

Having regard to the principles of construction which may be found in Endlich on the Interpretation of Statutes, par. 436, especially referring to *Regina v. Ingram*, 2 Salk. 593; Harcastle's Construction of Statutes, 2nd ed., pp. 262-3; *In re Ronald and the Village of Brussels*, 9 P. R. 232, I think we must hold the provisions of sub-sec. 6, sec. 22, ch. 55 of 57 Vict. (O.), directory, so as to prevent the injustice of a construction which would cause an appellant who had done all the law required him to do to lose his right of appeal—in fact, practically, to have his appeal dismissed, because the Judge might neglect to hear and determine, or hear, or determine, the appeal within two months after receiving notice thereof: see the observations of Cameron, J., in *Re Ronald and the Village of Brussels*, pp. 237-8, which *mutatis mutandis* apply to this case.

The only substantial doubt which was raised on the argument was by reason of the change in the language of the section from that of sec. 11, sub-sec. 5, of ch. 220, R. S. O.; but it seems to me that the words "but his neglect or omission so to do shall not render invalid the hearing or determining of the appeal after the lapse of that time," were probably dropped because the law being

so it was unnecessary to declare it, and the remaining words of the section enabling the Judge to fix a later date for the hearing and determining than that fixed by the section were dropped so as to make the duty imperative upon the Judge, that is to say, so that it should not appear to be optional on the part of the Judge whether he would perform the duty within the time required or not, although the non-performance on his part would not necessarily invalidate the appeal.

Judgment.

Rose, J.

Whether such were the reasons for varying the language of the section or not, I cannot find in the change any sufficient declaration of an intention to change the law from what I understand it was apart from the declaration in sub-sec. 5, of sec. 11.

I am therefore of the opinion that His Honour Judge Finkle was right in holding that he had jurisdiction to hear the appeal, and that the judgment of my brother Robertson, dismissing the motion for prohibition, must be affirmed with costs.

FALCONBRIDGE, J., concurred.

G. A. B.

[COMMON PLEAS DIVISION.]

VILLAGE OF LONDON WEST V. LONDON GUARANTEE AND
ACCIDENT COMPANY.

Insurance—Employee's Guarantee Contract—Renewal—Ontario Insurance Corporations Act, 1892, sec. 32, sub.-sec. (2)—Condition—Misstatements—Materiality..

By a contract in writing, made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums":—

Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of section 33.

Held, also, that upon the true construction of sub-section (2), the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract.

Statement.

THIS action was brought by the plaintiffs, a municipal corporation, to recover from the defendants \$1,000, the amount which, by an agreement to guarantee dated the 23rd June, 1890, the defendants agreed to make good and reimburse to the plaintiffs in respect of pecuniary loss which the plaintiffs might sustain by reason of fraud or dishonesty on the part of John McKellar Lord, in connection with his duties as tax collector of the village of London West, during one year from the date of the agreement, or during any year thereafter in respect of which the defendants should consent to accept the premium of \$15, which was the consideration for the agreement to guarantee.

The agreement recited that the plaintiffs had delivered to the defendants certain statements and a declaration setting forth, amongst other things, the duties and remuneration of Lord, who was styled "the employé," the moneys intrusted to him, and the checks to be kept upon

his accounts, and had consented that such declarations, Statement.
and each and every the statements therein referred to or
contained, should form the basis of the contract.

The agreement was also declared to have been entered into on the condition that the business of the plaintiffs should continue to be conducted, and the duties, and (except that it might be increased) the remuneration of the employé should remain in accordance with the statements and declarations thereinbefore referred to, and that if, during the continuance of the agreement, any circumstance should occur or change be made which should have the effect of making the actual facts materially differ from such statements, or any of them, without notice thereof being given to the defendants, and their consent or approval in writing being obtained, or if any suppression or misstatement of any fact affecting the risk of the defendants should be made at the time of payment of the first or any subsequent premium, or if the employer should continue to intrust the employé with money or valuable property, after having discovered any act of dishonesty

* * the agreement should be void and of no effect from the beginning.

The agreement also provided that on the discovery of any fraud or dishonesty of the employé of the character mentioned in the agreement, the plaintiffs should immediately give notice of it to the defendants.

The agreement, though dated the 23rd June, 1890, was not delivered to the plaintiffs until about the 23rd July following, but the defendants, on the 2nd July, 1890, issued and delivered to the plaintiffs an interim receipt.

The agreement was continued by a renewal receipt on the 23d June in each of the years 1891, 1892, and 1893, for one year from those respective dates, and the premium paid was called in the receipts "the renewal premium."

The claim sued for was in respect of acts of fraud and dishonesty committed during the years 1893 and 1894.

The defendants set up as a defence that the agreement sued on was based upon certain statements and the decla-

Statement. ration made by the plaintiffs, through their reeve, Mr. A. F. Lacey, and that certain of the statements were untrue.

The defendants also pleaded that the plaintiffs had discovered acts of fraud and dishonesty on the part of Lord, but did not immediately give notice thereof to the defendants, and that the plaintiffs had continued to intrust him with money and valuable property after having discovered an act of dishonesty on his part; that these acts and omissions were in breach of the conditions of the agreement; and that the defendants were, by reason of them and of the misstatements before referred to, relieved from liability under the agreement.

The action was tried before MEREDITH, J., with a jury, at London at the Winter Assizes, 1895.

Questions were left to the jury as to the statements and declarations made by Mr. Lacey, most of which they answered in favour of the plaintiffs, but some of which were not answered.

The learned Judge thereupon entered judgment in favour of the plaintiffs.

The defendants moved at the Hilary Sittings of the Divisional Court, 1895, to set aside the findings and judgment and to enter judgment for them or for a new trial.

On the 12th February, 1895, the motion was argued before the Divisional Court (MEREDITH, C. J., and ROSE and MACMAHON, JJ.).

W. R. Riddell (with him *James Pearson*), for the defendants. If the statements are untrue, it is no matter whether they are material or not. Section 33* of the In-

* 33—(1) Where any insurance contract made by any corporation whatsoever within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract; and unless so set out, no term of, or condition, stipulation, warranty or proviso modifying or impairing the effect of any such contract made or renewed after the com-

Argument.
 surance Corporations Act, 1892, 55 Vict. ch. 39 (O.), does not apply; it applies only to contracts made or renewed after the commencement of the Act. This contract was made before the Act, and was never renewed in any way. It is not a contract for a specified time, but for an unlimited number of years, and requires no renewal. True, we call the receipts given annually "renewal receipts," but that is a matter of terminology. Test it by the subject-matter of the contract. A renewal of a contract is a new contract entirely. At any rate, sec. 33 is sufficiently complied with by reference to the application: *Venner v. Sun Life Insurance Co.*, 17 S. C. R. 394. The jury have not passed upon the question of materiality: see sub-sec. (3) of sec. 33. [Counsel also supported the motion upon other grounds.]

E. R. Cameron, for the plaintiffs, contra.

June 29, 1895. MEREDITH, C. J. :—

[After setting out the facts at length and ruling in favour of the plaintiffs upon a number of questions arising out of the findings of the jury as to the alleged misstatements, and upon an application for leave to amend made and refused at the trial]:—

A further question was argued as to the application of sec. 33 of the Ontario Insurance Act, 1892, to the contract sued on, and the effect of sub-sec. (2) of that section.

The contention of the defendants was that, as the commencement of this Act shall be good or valid, or admissible in evidence to the prejudice of the assured or beneficiary. * * * * *

(2) No contract of insurance made or renewed after the commencement of this Act shall contain, or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is limited to cases in which such statement is material to the contract, and no contract within the intent of section 2 of this Act shall be avoided by reason of the inaccuracy of any such statement unless it be material to the contract.

Judgment.
Meredith,
C.J.

tract in question was, in terms, for one year, and any year afterwards for which the defendants should consent to accept the agreed premium, it could not be said to have been made or renewed after the commencement of the Act, within the meaning of sec. 33.

I am unable to agree to this contention. The contract itself refers to renewals of it, the yearly receipts given are styled "renewal receipts," and the premiums are spoken of as "renewal premiums."

It was, I think, just such a continuation of the contract that the Legislature had in view when it spoke of a contract being renewed; and to give to the section the construction contended for would, I venture to think, be not only against the spirit but the plain meaning of the words which the Legislature has used, as those words are, used in reference to insurance contracts, ordinarily understood.

If, then, sec. 33 applies, sub-sec. (2) forbids the putting into the contract, or indorsing upon it, or making it subject to, any term, condition, stipulation, warranty, or proviso providing that the contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract, unless such term, condition, stipulation, warranty, or proviso is *limited* to cases in which such statement is material to the contract.

The stipulation or condition upon which the defendants rely is contained in the agreement to guarantee, but it is *not limited* to cases in which the statement inducing the contract is material to the contract, and is, therefore, in my opinion, an illegal stipulation or condition, and the defendants cannot rely upon it to defeat the plaintiffs' claim.

The Legislature has, as I read the sub-section, forbidden the insurer to stipulate as to the matters with which it deals, unless the stipulation, in terms, limits its application to cases in which the statements which are to avoid the contract are statements material to the contract. The provision is not only that the contract shall not be avoided by reason of the inaccuracy of the statement unless it be material to the contract, but that the contract shall not

contain, or have indorsed upon it, or be made subject to, any term, etc., unless such term is limited to cases in which such statement is material to the contract.

Judgment.
Meredith,
C.J.

In my opinion, all of the objections fail, and the motion should be dismissed with costs.

ROSE, J. :—

I think this policy is one “renewed” after the passing of 55 Vict. ch. 39 (O.), and, therefore, subject to the provisions of sec. 33 of that Act.

It provides as follows: “It is hereby agreed and declared that during one year from the date hereof, and during any year thereafter in respect of which the company shall consent to accept the aforesaid premium * * the company shall * * make good,” etc. “Provided that * * the company shall be entitled to call for, at the employer’s expense, such reasonable particulars and proofs of the correctness * * of the statements made at the time of effecting this agreement, *or made or deemed to be made at the time of the payment of any renewal premium*, as the directors think fit.”

Each receipt issued for premiums paid, subsequently to the first one, is called “renewal receipt,” and the premium is stated to be “renewal premium for a guarantee” under the policy for the year following the date of such receipt.

I find the word “renewal” used in works on the law of insurance as applicable to the continuing of a policy in similar terms, *e.g.*, Bliss on Life Insurance, 2nd ed., sec. 299, p. 488.

I think we must read the section as intended to apply to such a policy as the one in question.

I have had much more difficulty in arriving at a conclusion as to the proper construction of sub-sec. (2) of sec. 33.

Leaving out all words not specially applicable to the form of contract here, such sub-section may be read as follows: “No contract of insurance made or renewed after

Judgment.

Rose, J.

the commencement of this Act shall contain any proviso providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, *unless such proviso is limited to cases in which such statement is material to the contract*, and no contract within the intent of section 2 of this Act shall be avoided by reason of the inaccuracy of any such statement, unless it be material to the contract."

Does such section require the condition to be limited in terms as follows: "This condition is limited to cases in which such statement is material to the contract?" Or would it be sufficient if the cases to which the condition is made to apply are cases in which the statement is material to the risk?

For example, if, out of, say, six statements, it would be manifest that at least three were material, and if the condition was limited to such three, naming them, would the statute be complied with? If so, what would be the effect of including, with the three, one or two which afterwards were held to be immaterial? This latter construction would, I fear, introduce much uncertainty into the contract.

I have come to the conclusion that the insured must have clear and distinct notice, in the words of the statute, that the condition, etc., "is limited to cases in which the statement is material to the contract."

It is true that this construction renders of no moment the remaining words of the section. They are not found in the corresponding section of the Dominion Act, R. S. C. ch. 124, sec. 28, and I do not know why they were added.

I have been somewhat assisted to the conclusion I have arrived at by the analogy to secs. 115 and 116 of R. S. O. ch. 167, where it is declared that any insurance company desiring to vary conditions must print in conspicuous type on the policy a notice that such variations shall be in force only as far as they shall be held to be just and reasonable.

In both cases it may be assumed that the object of the Legislature was to give the insured notice, in terms, in the policy, of the statutory provision in his favour.

Judgment.

Rose, J.

For these reasons, I agree to the conclusion announced by the learned Chief Justice.

I have not, however, formed any opinion on the facts as to the misrepresentations adverse to the contention of Mr. Riddell for the company.

MACMAHON, J.:—

I have not deemed it necessary to consider the facts in connection with the alleged representations made in the applications sent to the company, and upon the faith of which the policy was issued, but which the company aver were false ; as I have reached the conclusion that where, subsequent to the passing of the statute 55 Vict. ch. 39, sec. 33 (O.), a renewal receipt has been issued, the Act applies to such a policy as this, and the non-compliance with the provisions of the Act disentitles the company to successfully set up the misstatements in the application so as to avoid the contract.

Motion dismissed with costs.

E. B. B.

[COMMON PLEAS DIVISION.]

HANES V. BURNHAM.

Defamation—Slander—Privileged Occasion—Interest—Duty—Belief—Express Malice—Burden of Proof—Evidence—Notice of Action—Public Officer.

The plaintiff, the wife of a postmaster, complained of slander by the defendant, an assistant post office inspector, to the effect that she had taken money from letters and had given him a written confession of her guilt :—

Held, that as to statements made in the discharge of the defendant's official duty, to the plaintiff's husband as postmaster, and to two other persons as sureties for him, the occasions were privileged ; but not so as to statements made to a partner of one of the sureties, who used the post office, and to whose business premises the defendant contemplated removing it ; for the defendant and the partner had no such common interest in the matter as justified the communication, nor was there any public or moral or social duty resting on the defendant which justified him in making it. Even had the evidence shewn that the defendant honestly believed that such a duty rested upon him or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged.

2. Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false.

And where the plaintiff in her evidence denied that she had made a confession to the defendant, but admitted in a qualified way that after her denial the defendant continued to assert to her, and appeared to believe, that she had made one :—

Held, that, in the absence of a clear admission by the plaintiff, there was evidence of malice in fact to go to the jury.

3. The defendant was not entitled to notice of action as a public officer ; the statutes requiring such notice applying only to actions brought for acts done.

Royal Aquarium Society v. Parkinson, [1892] 1 Q. B. 431, followed.

Murray v. McSwiney, I. R. 9 C. L. 545, distinguished.

Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice.

Statement. SLANDER.

The plaintiff was the wife of the former postmaster at Lynden, and the defendant was, at the time the occurrences in respect of which the action was brought took place, assistant post office inspector at Toronto, in which inspection division the Lynden post office was situate.

The plaintiff complained of statements made by the

defendant, the effect of which was to charge her with having taken money out of certain post letters, and a certain post letter containing money, in the years 1893 and 1894, and to assert that she had made to him a written confession of guilt signed by herself. Statement.

These statements were alleged to have been made to Firman Clement, who was one of the sureties to the Postmaster General for the proper discharge by the plaintiff's husband of his duties as postmaster at Lynden; to the husband of the plaintiff; to William Hanes, a brother of the husband, and also one of his sureties; and to William E. Ryan, the partner in business of Clement.

The defendant, besides denying that he made use of the language complained of, pleaded that the several occasions on which the words were used, if it appeared that he had spoken them, were privileged occasions, and that the words were spoken *bonâ fide*, in the honest belief of the truth of them, and without malice, and he also set up want of notice of action as a defence, referring to the following enactments: R. S. C. ch. 35, secs. 1, 3, 10, 12, 13, 14, 15, 17, 49, 118; 52 Vict. ch. 20, sec. 13 (D.); R. S. C. ch. 32, secs. 1, 145, 146, 147, 148; R. S. O. ch 73, secs. 1, 8, 12, 13, 14, 15, 20.

The action was tried before ROBERTSON, J., with a jury, at the Hamilton Winter Assizes, 1895.

At the close of the plaintiff's case, the learned Judge ruled that each of the occasions on which the words complained of were spoken was a privileged occasion, and there being, as he also held, no evidence of malice proper to be submitted to the jury, he decided that the action failed, and, without calling upon the defendant for his defence, withdrew the case from the jury and dismissed the action.

At the Easter Sittings of the Divisional Court, 1895, the plaintiff moved to set aside the judgment of non-suit and for a new trial.

Argument. The motion was argued before MEREDITH, C.J., and ROSE, J., on the 21st May, 1895.

Lynch-Staunton, for the plaintiff. The statements made by the defendant were not believed by him to be true, and therefore there is no privilege. The defendant declared he had a written confession signed by the plaintiff, but it is not pleaded and not produced. The statements made to Ryan are certainly not privileged; he had no interest. The duty of the defendant and the interest of the person to whom he makes the statement must appear where privilege is claimed. The falsehood of the defendant in declaring he had a written confession is evidence of express malice to go to the jury. The statements were made after the holding of the investigation by the defendant. I refer to *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54; *Dewe v. Waterbury*, 6 S. C. R. 143; *Fountain v. Boodle*, 3 Q. B. 5; *Royal Aquarium Society v. Parkinson*, [1892] 1 Q. B. 431; *Todd v. Dun*, 15 A. R. 85; *Stewart v. Sculthorp*, 25 O. R. 544. The defendant was not entitled to notice of action. No statute gives any man the right to utter a slanderous untruth, and then require notice of action as a public officer. I refer to *Bond v. Conmee*, 16 A. R. 398; *Ross v. Bucke*, 21 O. R. 692; *Oddy v. Paulet*, 4 F. & F. 1009; *Royal Aquarium Society v. Parkinson*, [1892] 1 Q. B. 431.

J. G. Farmer, on the same side. In the defendant's pleading, the statutes relied on are not stated to be public Acts; nor are the proper Acts referred to. Section 118 of R. S. C. ch. 35, is repealed by 52 Vict. ch. 20, sec. 13 (D.); and 51 Vict. ch. 14, sec. 30 (D.), amending R. S. C. ch. 32, is not pleaded at all.

Ritchie, Q. C., for the defendant. Want of notice of action is pleaded. Application was made at the trial for leave to amend the defence, if necessary, and I now ask the same leave. If the public officer, *bonâ fide*, believes he is acting in the discharge of his duty, malice makes no difference: *Sinden v. Brown*, 17 A. R. 173. As to privilege; if the occasion is privileged, the plaintiff must fail

unless she shews express malice: *Clark v. Molyneux*, 3 **Argument**, Q. B. D. 237. The confession was obtained a year previously, and the defendant believed he had it, and the evidence shews it. The onus of shewing malice is directly on the plaintiff. The investigation was made at the instance of the sureties. The defendant was discharging a legal and moral duty. Ryan had an interest; Ryan was a partner of Clement, one of the sureties, and the suggestion had been made that the post office should be moved to their place of business; it was reasonable that the defendant should mention the facts to Ryan, and the occasion was privileged. I refer to *Jenoure v. Delmege*, [1891] A. C. 73; *Stuart v. Bell*, [1891] 2 Q. B. 341; *Cowles v. Potts*, 34 L. J. N. S. Q. B. 247; *Gorst v. Barr*, 13 O. R. 644; *Hagreaves v. Sinclair*, 1 O. R. 260.

F. E. Hodgins, on the same side. The circumstances shew absence of malice. I refer to *Hart v. Gumpach*, L. R. 4 P. C. 439; *Spill v. Maule*, L. R. 4 Ex. 232; *Botterill v. Whytehead*, 41 L. T. N. S. 588. As to privilege, I refer to *Hunt v. Great Northern R. W. Co.*, [1891] 2 Q. B. 189; and as to notice of action, to *Murray v. McSwiney*, I. R. 9 C. L. 545.

Lynch-Staunton, in reply.

June 29, 1895. MEREDITH, C. J.:—

I agree in the view of the learned Judge as to all of the occasions on which the words complained of were spoken being privileged occasions, except as to the one on which the communication was made to Ryan.

The defendant in speaking them on these occasions was acting in the discharge of his duty as assistant post office inspector; and the husband as postmaster, and Clement and William Hanes as sureties for him, had an interest in the subject-matter to which these communications related; but the circumstances under which the communication was made to Ryan, and the relation of Ryan to the parties, were not, in my opinion, such as to make the occasion a

Judgment.
Meredith,
C.J.

privileged one. He was, it is true, the business partner of Clement, one of the sureties, and a person who had, in the course of his business, occasion to use the Lynden post office, and it was, at the time he was spoken to, contemplated to remove the post office to the place where the business of himself and his partner was being carried on; but these circumstances did not, I think, create an occasion of privilege in respect of the communication made to Ryan. The defendant, at the time when that communication was made, had determined to remove the plaintiff's husband from his position as postmaster, and the post office from his place of business; he was not communicating with Ryan with the view of satisfying himself of the guilt of the plaintiff, or of the justice or propriety of the change which he had determined on making, and Ryan had, in my opinion, no such interest in the matter to which the communication related as justified the defendant in making it to him, more especially as the defendant had already communicated all that he told him to Clement; so that, even if he would have been justified in making the statement in order to warn the firm against the danger of intrusting money letters to the post office at Lynden while the plaintiff's husband was the postmaster there, and she had therefore means of access to them, that purpose had already been served by what he had told Clement. Nor do I think, for the same reasons, that there was any moral or social duty resting on the defendant which justified him in making that communication.

Dealing with the question of privilege, Baron Parke, in *Toogood v. Spyring*, 1 C. M. & R. 181, at p. 193, said: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any

reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

Judgment.

Meredith,
C.J.

This statement has been recognized in the subsequent cases as containing a correct exposition of the law upon the subject. Referring to it, Lindley, L. J., says, in *Stuart v. Bell*, [1891] 2 Q. B. at p. 346: "This passage has been frequently quoted, and always with approval."

In *Whiteley v. Adams*, 15 C. B. N. S. at p. 414, Erle, C. J., said: "Each of these letters contains matter which is clearly defamatory of the plaintiff, and forms the foundation of an action, unless the circumstances under which it was written bring it within the protection afforded by the law to what are called privileged communications. I take it to be clear that the foundation of an action for defamation is malice. But defamation pure and simple affords presumptive evidence of malice. That presumption may be rebutted by shewing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again lately in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the person writing or uttering them, he is bound to hold that the action fails."

In the same case (p. 418) Erle, C. J., spoke of the great difficulty felt by Judges in dealing with questions as to whether the occasion justified the speaking or writing of the defamatory matter, of defining what kind of social or moral duty or what amount of interest will afford a justification: and Lindley, L. J., in *Stuart v. Bell*, at p. 350, referring to the same matter, says: "I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty

Judgment. enforceable by legal proceedings, whether civil or criminal.”
 Meredith,
 C.J.

Stuart v. Bell is also an authority for the proposition that in order to make the occasion privileged, it is necessary that the person to whom the statement is made, as well as the person making it, should have an interest or duty in respect of the subject-matter of such statement: *per* Lindley, L. J., at pp. 348, 349; *per* Lopes, L. J., at pp. 354-5; and Kay, L. J., at p. 358. See also *Pullman v. Walter Hill & Co.*, [1891] 1 Q. B. at p. 529; *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54.

For the reasons already given, I am unable to see how it can be said that the defendant made the communication to Ryan in the discharge of his public duty or in the discharge of any social or moral duty which he owed to Ryan, or that they had a common interest in the matter communicated so as to justify the communication on that ground. The circumstances under which the communication was made seem to me to negative any such ground of justification or excuse for making it.

Even had the evidence shewn that the defendant honestly believed that such a duty rested upon him or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged: *per* Lindley, L. J., in *Stuart v. Bell*, at p. 349; and *per* Kay, L. J., at p. 356. “Both the defendant and Stanley,” says Lindley, L. J., “say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant’s belief, but on whether he was right or mistaken in that belief.” See also *Hebditch v. MacIlwaine*, *supra*.

With great respect for the opinion of my learned brother Robertson to the contrary, and fully recognizing that the question was one to be determined by him, that his decision ought not to be reversed unless it is clear that he came to a wrong conclusion, and bearing in mind also the

difficulty which was pointed out by Erle, C. J., in defining what kind of social or moral duty or what amount of interest will afford a justification, I am, nevertheless, forced to the conclusion that the occasion of the communication to Ryan was not privileged.

Judgment.
Meredith,
C.J.

It was further contended by the plaintiff's counsel that as to all of the communications, even if the occasions upon which they were made were privileged, so far as they involved or included the statement that the plaintiff had made to the defendant and signed a written confession of her guilt, there was evidence of malice which should have been submitted to the jury. It is clear, and was conceded upon the argument, that where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and that the burden of proving this is on the plaintiff: *Clark v. Molyneux*, 3 Q. B. D. 237; *Stuart v. Bell*, at pp. 345 and 351, *per* Lindley, L. J.; *Pullman v. Walter Hill & Co.*, at p. 529. But it was contended that the evidence was such as to warrant a finding that these statements of the defendant were as to matters which must necessarily have been within his own knowledge, and, if untrue, were so to his knowledge, and that that was evidence of malice in fact to go to the jury.

In *Fountain v. Boodle*, 3 Q. B. at p. 12, Lord Denman said that malice may be established by various proofs: one may be that the statement is false to the knowledge of the party making it. And again, on the same page: "I told the jury to the effect that, if the plaintiff brought any evidence of wilful untruth, some evidence of the contrary might be reasonably expected, where the nature of the case allowed it."

In *Royal Aquarium Society v. Parkinson*, [1892] 1 Q. B. 431, the case was put by the plaintiff on the ground that the defendant stated what he knew to be untrue, and the Judge at the trial left the question whether that was so to the jury. Referring to this contention of the plaintiff, Lord Esher, at p. 443, said: "If a person states what he knows to be untrue, no one ever doubted that he

Judgment. would be abusing the occasion." And he points out that, though it is sometimes said that the person claiming the protection afforded by the occasion being privileged must be acting *bonâ fide* and not maliciously, that way of expressing the rule is not quite exhaustive or correct, and that the question is whether he is using the occasion honestly or abusing it. Then follows the quotation already made, and he adds : " If a person charged with the duty of dealing with other people's rights and interests has allowed his mind to fall into such a state of unreasoning prejudice in regard to the subject-matter that he was reckless whether what he stated was true or false, there would be evidence upon which a jury might say that he abused the occasion : " p. 444.

Meredith,
C.J.

Applying these statements of the law to the facts of this case, was there not evidence upon which a jury might say that the defendant abused the occasion, either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false ?

I do not at all question that though the statement were as to a matter spoken of as being within the knowledge of the speaker, and untrue, yet if it were made owing to misapprehension or imperfect recollection, but in the honest though mistaken belief that it was true, the defendant would be protected ; but that, in my opinion, was a question upon which, on the facts given in evidence in this case, the plaintiff was entitled to the opinion of the jury.

The evidence of the plaintiff was that she had never made any confession, oral or written ; that, on the contrary, she had repeatedly and persistently denied that she was guilty, and refused to make any confession, though pressed by the defendant to do so ; that the defendant, after hearing her explanation, had spoken of it as an absurd story ; and that, immediately before making the statement as to the confession to Ryan, she had categorically denied to the defendant that such a confession or any confession at all had been made by her ; and as to most of these statements

there was corroborative evidence. But it was said that, notwithstanding the plaintiff's denial, the defendant continued to assert to her the truth of his own statement as to the confession having been made, and that the plaintiff admitted at one stage of her cross-examination that the defendant appeared to her to believe that he had obtained the confession; and it was urged that, in the face of this, no jury could reasonably or properly find that the defendant did not honestly believe the truth of what he was asserting, or that he asserted what he did assert recklessly, not caring whether it was true or false.

It is true that the defendant did continue to assert to the plaintiff the truth of his statement of the confession, notwithstanding her denial of it, and it is also true that the plaintiff at one stage of her cross-examination made the admission referred to, but that admission was, I think, very much modified, and the effect of it lessened, by what was said by her in other parts of her evidence. On page 19 of the shorthand notes, it appears that after the alleged admission had been made by her, she was asked by counsel for the defendant, referring to the alleged confession:—"Q. And seemed to believe it, seemed to think you had?" To which she answered: "That was what he said." And again, on the same and following page: "Q. And you had no reason to doubt that he firmly believed it at that time; it might be a mistaken belief?" To which the answer was: "I do not know what he believed; I know what he said; I do not know how he could believe it when he knew I had made no confession."

And so as to Clement's evidence, which was also relied on; in answer to similar questions put to him he replied: "Well, he used strong enough language;" and again: "I do not know what he believed;" and again: "Certainly he told it in good, strong language."

Assuming that, had there been a clear and unequivocal admission by the plaintiff that she believed that the defendant honestly believed in the truth of the statement which he made as to the confession, the evidence would not have

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been sufficient to justify its submission to the jury on the question of malice, I am of opinion that the evidence, taken, as it should be, as a whole, especially having regard to what the plaintiff did candidly admit, that the circumstances of suspicion with regard to the letters were strong against her, and the difficulty of separating her statements which referred to this fact from those dealing with the alleged confession, falls far short of amounting to such an admission, and I do not think that there was anything in the evidence which justified the withdrawal of the question of malice from the jury.

It may well be that, when the defendant's evidence comes to be heard, the jury may not, especially having regard to the admitted circumstances of suspicion attending the loss of the money and the letter, pointing to the plaintiff as the person who was guilty of stealing them, draw an inference from all the facts given in evidence unfavourable to the defendant on the question of malice. But whether or not such an inference is to be drawn, is the province of the jury, and not the Judge, to determine.

As to the only remaining ground of defence, that of want of notice of action, the decision of the Court of Appeal in *Royal Aquarium Society v. Parkinson*, already referred to, is conclusive against the defendant. It was there held that the provisions of a statute similar in its terms to the Acts relied on in this case did not entitle the defendant to notice in an action for slander; that the statute applied only to actions brought for acts done; that words spoken were not "acts done;" and that all the expressions refer to some act done, or fact committed; and that there must be some positive act done. That decision is binding on us, notwithstanding the previous decision in the Irish case cited by Mr. Hodgins, *Murray v. McSwiney*, I. R. 9 C. L. 545 (1876). In that case the question arose upon demurrer, and it was pointed out in delivering judgment that at the trial it would be open to the plaintiff to question whether the defendant was in fact acting in the

discharge of his official duty or *bonâ fide* believed he was so acting when he spoke the words complained of. If, therefore, the law had been as laid down in that case, the plaintiff was entitled, in my opinion, to have these questions submitted to the jury, and, if they had been answered in the negative, the defendant would not be entitled to the protection of the statute.

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C.J.

Apart from authority, too, I should have been prepared to hold that the statutes relied on cannot be invoked by a defendant where the words spoken are defamatory and have been uttered with express malice, for in such a case the defendant does not speak them in the *bonâ fide* and honest discharge of his duty, and the ground upon which his liability rests is that he has not used the occasion honestly, but has abused it for an indirect and malicious purpose.

Upon the whole, I am of opinion that the appeal should be allowed and the judgment of my brother Robertson reversed.

The costs of the last trial and of the appeal will be costs in the cause to the plaintiff in any event.

ROSE, J., concurred.

E. B. B.

[COMMON PLEAS DIVISION.]

REGINA V. STEELE.

Justice of the Peace—Summary Conviction—Interest—Bias—Relationship to Complainant—Costs.

Where the convicting justice was the son of the complainant, and the latter was entitled to one-half of the penalty imposed, a summary conviction was quashed, on the ground that the justice had such an interest as made the existence of real bias likely, or gave ground for a reasonable apprehension of bias, although there was no conflict of testimony.

The Queen v. Huggins, [1895] 1 Q. B. 563, followed.

Dictum of ROSE, J., in *Regina v. Langford*, 15 O. R. 52, approved.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts.

Statement. MOTION to quash a summary conviction of the defendant made by George H. Clark, a fishery overseer, and an *ex officio* justice of the peace, for an infraction of the Fisheries Act.

The facts and arguments are sufficiently stated in the judgment.

The motion was argued before MEREDITH, C. J., and ROSE, J., on the 21st May, 1895.

R. D. Gunn, for the defendant.

F. E. Hodgins, contra.

July 13, 1895. MEREDITH, C. J.:—

Several objections were urged against this conviction, only one of which it is, in the view we take, necessary for us to consider.

The complainant, Andrew Clark, is, by the provisions of the Act under which his complaint was laid, entitled to one-half the penalty imposed, and he is the father of the convicting magistrate; and the question is whether, under these circumstances, the defendant objecting to his doing so, the magistrate should have heard and adjudicated upon the complaint.

If the case is to be determined on the rule which applies to challenges for favour in the case of jurors, the magistrate was in this case, by reason of his relationship to the complainant, clearly disqualified; the rule applicable to such challenges being, as stated by Littleton, that it is a good ground of challenge "if the juror be of blood or kindred to either party, * * and this is a principal challenge, for that the law presumeth that one kinsman doth favour another kinsman before a stranger; and how far remote so ever he is of kindred, yet the challenge is good:" Coke on Littleton, 157*a*.

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C.J.

The rule with regard to the disqualification of a Judge seems to be different. In *Brookes v. The Earl of Rivers*, Hardres 503, in answer to an objection that one of the parties was related to the Judge by marriage, the Court said that it was not a good objection, "for favour shall not be presumed in a Judge." This case is referred to with approval in *The Queen v. Dean, etc., of Rochester*, 17 Q. B. 1, at p. 31, and is also mentioned in Stone's Justices' Manual, 26th ed., at p. 728, as an authority for the proposition that relationship to one of the parties does not in the case of a justice of the peace operate as a disqualification. To the same effect are the opinions of Chief Justice Allen and Mr. Justice Tuck in *Ex p. Grieves*, 29 New Brunswick 543.

The provisions of such Imperial statutes as 41 & 42 Vict. ch. 16 (the Factory and Workshop Act, 1878), sec. 89, which provides that in a proceeding before a court of summary jurisdiction with respect to an offence against the Act alleged to have been committed in or with reference to a factory or workshop, the occupier of that factory or workshop, and the father, son, or brother of such occupier, shall not be qualified to act as a member of such court, seem to indicate that, in the view of the framers of such Acts, some legislative prohibition was necessary to effect a disqualification of the magistrate on the ground of relationship to one of the parties, and therefore to support the correctness of the statements of the law to which I

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have just referred, while they indicate also that the probabilities of bias are so great in the case of relationship in so close a degree as that to which the section quoted applies, that it was proper that one related within those degrees to the occupier should be absolutely disqualified for being a member of the court.

It would seem, therefore, though a logical reason for the difference is difficult to discover, that while in the case of a juror favour is presumed from relationship, it is not presumed in a Judge.

There are many cases to be found in the books in which convictions, orders, and decisions of tribunals, the member or a member or members of which were, according to the principles upon which, in English Courts, justice should be administered, disqualified by reason of interest or bias from adjudicating upon the matters in question before them, have been quashed on that ground.

That a pecuniary interest, however small, is an absolute disqualification, is beyond question.

Where, too, the magistrate or person exercising judicial functions is the prosecutor, or the person or one of several persons on whose behalf, at whose instance, or in whose interests, the proceedings are taken, he is disqualified, conformably to the rule which is well expressed in the maxim "*nemo debet esse judex in propria sua causâ.*"

Within neither of these classes does the present case fall, but there is undoubtedly another class of cases in which the supervising jurisdiction of the superior courts over the inferior courts and judicial bodies has been exercised, the limits of which have not been defined, and probably advisedly so, but have been stated in general and comprehensive terms; and it is within that class, if any, that the conviction we are considering must fall.

In *The Queen v. Rand*, L. R. 1 Q. B. 230, Mr. Justice Blackburn said: "Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be under-

stood to say, that where there is a real bias of this sort, this Court would not interfere.”

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C.J.

In *The Queen v. Meyer*, 1 Q. B. D. 173, the same learned Judge said: “The question is, was Mr. Meyer really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter?” And again, referring to the *Rand* case, he said: “The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices’ decision.”

The Queen v. Milledge, 4 Q. B. D. 332, was a case coming within the second class to which I have referred, the ground of the decision being that the justices practically made an order in a case where they were prosecutors.

The Queen v. Gibbon, 6 Q. B. D. 168, was a case of the same class as the *Milledge* case.

In *The Queen v. Handsley*, 8 Q. B. D. 383, the *Milledge* case was recognized as a correct decision, and the *Gibbon* case was disapproved of, not on the incorrectness of the rule recognized in it, but because the rule was not applicable to the facts of that case, and the language of Mr. Justice Blackburn was practically repeated by the Court—“in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.”

In *The Queen v. The Justices of Great Yarmouth*, 8 Q. B. D. 525, Mr. Justice Field said: “The administration of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should

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abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind."

The Queen v. Lee, 9 Q. B. D. 394, may also be referred to as an authority as to the second class of cases.

In *The Queen v. Farrant*, 20 Q. B. D. 58, it was held that the mere fact that a magistrate, who was a surgeon and had attended a person who had been injured by an assault, had endeavoured to induce him not to prosecute and had conveyed to him a message from his assailant offering an apology and suggesting a settlement, did not shew that he had such a substantial interest in the result as to make it likely that he would have a bias, and to disqualify him from hearing a complaint laid by his patient against his assailant for the assault. Mr. Justice Stephen, in delivering judgment, referred to what he spoke of as a leading principle of English law, that no one is allowed to be a judge in his own case, and said: "That means that the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge. * * But the law does not stop there, for there may be an interest which has substantially the same effect as a pecuniary interest, though not of the same nature." And he refers to the *Rand*, *Meyer*, and *Handsley* cases, and adopts the rule laid down in them; and he then goes on to say: "The question here is whether Mr. Farrant had such a substantial interest, other than pecuniary, as to make it likely that he has a real bias."

In *Leeson v. General Council of Medical Education*, 43 Ch. D. 366, Lord Justice Cotton said (p. 379): "Of course, the rule is very plain that no man can be plaintiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that particular case—either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made."

In *The Queen v. Gaisford*, [1892] 1 Q. B. 381, Mr. Justice Mathew, at p. 383, said: "It was argued on his behalf that it was incumbent on the complainant to shew that the

justice was in fact influenced ; but, in my opinion, it is sufficient to shew, as was held in *Reg. v. Milledge*, that he might have been influenced." And Smith, J., said : " On the question of bias, apart from pecuniary interest, I entirely agree with the law as laid down by Cockburn, C.J., in *Reg. v. Milledge*."

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C.J.

In *The Queen v. Henley*, [1892] 1 Q. B. 504, Mr. Justice Lawrance said : " The cases * * shew most clearly that, if there is any danger of a substantial bias likely even unconsciously to influence a justice, he ought not to sit."

In *The Queen v. Huggins*, [1895] 1 Q. B. 563, Mr. Justice Wills said : " In these cases there is always a certain degree of difficulty, owing to the confusion which has arisen from a failure to clearly distinguish between the different classes of cases in which decisions have been quashed upon *certiorari* on the ground of the improper constitution of the tribunals which gave them, namely, cases in which one of the tribunal had a pecuniary interest, cases in which, though having no pecuniary interest, he nevertheless had a bias, and cases in which he filled the part of prosecutor as well as judge. * * Here there is no question of Martin " (one of the convicting justices) " having had any pecuniary interest in the result of the litigation, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias. It appears that Martin belongs to a small class of privileged persons for whose protection these proceedings were taken. Under those circumstances I cannot help thinking that it would not be in the general interests of justice that the conviction should be allowed to stand. It is impossible to overrate the importance of keeping the administration of justice by magistrates clear from all suspicion of unfairness. Suppose that all these six justices had been licensed pilots, or suppose, on the other hand, that they had all been unlicensed pilots ; in neither case would any one venture to say that the tribunal would have been a fair one. But if

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that be so, then the objection must equally exist when one only out of the six is a licensed pilot. It is far safer to enlarge the area of this class of objections to the qualification of justices than to restrict it." Mr. Justice Wright concurred, and added: "Some of the cases in which the Court has been asked to interfere are cases of decisions by administrative bodies, such as the London County Council and others. They are very different from cases of decisions by judicial tribunals. In my judgment, the Court ought to be slow to interfere in the former, but in the latter ought to interfere on much slighter grounds."

Regina v. The Justices of Cumberland, 58 L. T. N. S. 491, is a case in which the Court interfered by quashing the conviction, although, as Mr. Justice Mathew said, the justice had no pecuniary interest, nor was he influenced by any pecuniary motive, nor did he act from anything but a sense of public duty, and did what he thought was incumbent on him as a magistrate. Mr. Justice Smith in that case said, referring to the *Rand* case:—"This is the point: 'wherever there is a likelihood that the judge, whether from kindred or any other cause, would have a bias in favour of one of the parties, it would be very wrong of him to act.' That is the rule; where there is a real likelihood, from kindred or any other cause, that he may have a bias in favour of one of the parties, he ought not to act."

The Queen v. The Justices of Dublin, [1894] 2 I. R. 527, may also be referred to as containing a review of the English cases on the point in question, and the opinions of the Judges of the Queen's Bench Division as to the effect of them. See also *The Queen v. Fraser*, 9 Times L. R. 613; *Allinson v. General Council of Medical Education*, [1894] 1 Q. B. 750.

The principle to be deduced from these cases is, I think, that if a state of things exists, whether arising from relationship to the parties to the litigation or from other causes, which is likely to create a bias, even though it be an unconscious one, in the magistrate, in favour of one of the

parties, or, as put by Mr. Justice Wills in the *Huggins* case, which causes a reasonable apprehension of bias—that is sufficient to prevent his adjudication upon the matters in controversy being upheld, if it be impeached by a party who either had no knowledge of the existence of that state of things, or, knowing of it, objected to the magistrate acting; and in dealing with this question, which is one of fact, regard must be had to the principle upon which the rule is founded, that it is of the highest importance, in the general interests of justice, to keep its administration by magistrates clear from all suspicion of unfairness. I paraphrase here the language of Mr. Justice Wills, which is, if I may be permitted to say so, a clear and satisfactory exposition of the rule in question, and of the principle which underlies it.

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Meredith,
C.J.

In reaching this conclusion, I do not overlook the fact that it is not sufficient that there be a mere possibility of bias, as was said in several of the cases to which I have referred. That is quite true; and, on the other hand, it is not necessary that there should be real bias proved; it is sufficient if there be a likelihood of real bias, or a reasonable apprehension of bias.

In the Province of New Brunswick there are several reported cases where the disqualification of the justice has been placed upon the same grounds as apply to the challenge for favour in the case of a juror: among others, *Ex p. William Wallace*, 26 New Brunswick 593; *Ex p. Margaret Wallace*, 27 New Brunswick 174; *Ex p. Jones*, *ib.* 552, may be referred to.

The Supreme Court of Nova Scotia, it would appear from the report of the case in 3 R. & C. 375, *Re D. Barry Holman*, quashed a conviction on the ground that one of the convicting justices was the father of the complainant, but, in the very meagre statement of the case which the report contains, no reasons are given for the decision.

And in several of the United States the same rule seems to be applied both to Judges and justices of the peace, where there is no statutory provision on the subject, as

Judgment. there is in many of them : Am. & Eng. Enc. of Law, vol. 12,
Meredith, pp. 40 to 48 and notes ; p. 395, note 16.
C.J.

The authorities in this Province are not numerous, but, so far as they go, follow the English rule ; and in *Regina v. Langford*, 15 O. R. 52, my brother Rose incidentally had under consideration the same question as arises here, and gave effect to the view which I have expressed as to the scope of the rule, and applied it in a case not, I think, distinguishable from this.

There is no case which determines that relationship to one of the parties may not be found to be of such a character as to lead irresistibly to the conclusion that real bias was likely to arise, and the cases to which I have referred, and from which I have made somewhat extended excerpts, warrant me in coming to the conclusion that in this case, owing to the relationship of the complainant to the justice and the former's pecuniary interest in the result of the prosecution—he being entitled, as I have said, to half the penalty, and being liable also, in the event of the prosecution failing, to be ordered to pay the costs—the conviction cannot be upheld.

Can there be any doubt that there was in this case ground for a reasonable apprehension of bias, real likelihood of bias—unconscious it may be—but, nevertheless, bias which might operate to prevent the scales of justice being held evenly, and which justified the defendant in refusing to permit the magistrate before whom he was brought for trial, with his consent to sit in judgment between him and his accuser, that accuser being his own father ? It is quite true that in this case there was no conflict of testimony ; but can any one doubt that, had the justice to decide between accepting the sworn statement of his father and that of a stranger who was called as a witness for the defence, there would have been a reasonable apprehension that there might have been in his mind a bias, unconscious perhaps—conscious it might have been—in favour of the father's testimony ? I cannot doubt it, and have no hesitation in coming to the conclusion that there was in this case such an interest on the part of this magistrate as made

the existence of real bias likely, or, using again the language of Mr. Justice Wills, gave ground for a reasonable apprehension of bias which made the magistrate incompetent to sit, and his adjudication one that cannot be allowed to stand.

Judgment.
Meredith,
C.J.

It is of the utmost importance, I think, in a comparatively new country, such as this, where the magistrates are for the most part untrained men, and in many cases having necessarily but a limited knowledge of the law which they are called upon to administer, that the supervising power of the Court over their decisions should be freely exercised to prevent adjudications being given effect to where they are at variance with the fundamental principles upon which our law is and must be administered in order to command the respect of the community, or where the constitution of the tribunals by which they are pronounced is such as to create a well grounded suspicion of unfairness.

Even if I were not, as I think I am, supported by authority in coming to the conclusion at which I have arrived, I am not fettered by any authority which prevents my determining that the conviction should be quashed; but I am prepared to enlarge the area of the class of objections upon which the appellant relies, if it be necessary to do so, so as to make it impossible to uphold a conviction made under such circumstances as exist in this case, rather than to permit an adjudication which violates the fundamental principles underlying the administration of justice to stand.

I do not think the case is one in which the defendant should have costs. Apart from any other reason, he has not filed upon this application any affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts.

The conviction must be quashed without costs, and there will be the usual order for the protection of the magistrate.

ROSE, J. :—

I entirely agree.

E. B. B.

[QUEEN'S BENCH DIVISION.]

JOHNSON V. ALLEN.

*Parliamentary Elections—Ontario Election Act, 55 Vict. ch. 3, sec. 186—
Deputy Returning Officer—Refusal of Vote—"Wilful" Misfeasance—
Penalty.*

In an action against a deputy returning officer by a "person aggrieved," to recover a penalty under sec. 186 of the Ontario Election Act, 55 Vict. ch. 3, for an alleged wilful refusal to allow the plaintiff to vote:—

Held, that the word "wilful" in the section means "perverse" or "malicious;" and, although the plaintiff was deprived of his vote by the refusal of the defendant to allow him to deposit a "straight" ballot, and there was thereby a contravention of the Act, yet, as the defendant honestly believed the plaintiff was not qualified, and believed in his own power to withhold the ballot, the action failed.

Lewis v. Great Western R. W. Co., 3 Q. B. D. 195, followed.

Walton v. Apjohn, 5 O. R. 65, distinguished.

Statement.

ACTION brought by Olaf Johnson, a contractor, living in the town of Port Arthur, alleging himself to be an elector for the electoral district of West Algoma for the Legislative Assembly for the Province of Ontario, against F. B. Allen, a printer, and also a resident of the town of Port Arthur, who acted as deputy returning officer for polling subdivision number 4A in the town of Port Arthur at the election for the Legislative Assembly held on the 29th January, 1895, to recover \$400 damages and the costs of the action, and in default for the enforcement of the usual penalties under the Act respecting the election of members to the Legislative Assembly for the Province of Ontario, 55 Vict. ch. 3, and its amendment, for the defendant's wilful refusal to allow the plaintiff to vote.

The statement of claim alleged that the plaintiff's name was duly entered upon the voters' list to vote at the polling subdivision at which the defendant acted as deputy returning officer, and the plaintiff, at the proper time and in the proper manner, presented himself to vote, but the defendant, contrary to the Act, wilfully refused to allow the plaintiff to vote, and thereby deprived him of his right to have his vote cast and prevented him from casting it.

The defendant pleaded not guilty by statute 55 Vict. ch. 3, secs. 4a, 7, 71, 72, 85, 90, 91, and 103 (O.), and R. S. O. ch. 73, secs. 1, 14, 15, 20, 23. Statement.

The action was tried before BOYD, C., at Port Arthur, on the 19th June, 1895.

The facts given in evidence are stated in the judgment.

F. H. Keefer, for the plaintiff. A deputy returning officer has no judicial capacity; but here the defendant acted as if he had. When a name is on the voters' list, the duties of the deputy returning officer are merely ministerial; he cannot go behind the list: *Walton v. Apjohn*, 5 O. R. 65. He knew what he was doing, and had express directions as to his course, and acted advisedly, and so wilfully. Section 90 of the Ontario Election Act, 55 Vict. ch. 3, defines the duties of the deputy returning officer. Section 94 does not shield him. In refusing the plaintiff a "straight" ballot the defendant was guilty of a "wilful misfeasance," or of a "wilful act or omission" in contravention of the Act, within the meaning of sec. 186, and is therefore liable to the penalty. The giving of a tendered ballot to the plaintiff did not excuse the deprivation of his full rights as a voter.

Watson, Q. C., (with him *Ware*), for the defendant. The section is penal, and the proof must be strict. "Wilful misfeasance" must be shewn. What is the meaning of "wilful?" The voters' list is conclusive only as to property qualification, and not as to naturalization: see sec. 7 of the Act. Even if the plaintiff had a right to vote, and the defendant could not go behind the list, yet he acted honestly, and there was no wilful misfeasance, act, or omission. He acted *bonâ fide* on the advice of skilled persons and on his own understanding of the law. But, by marking the tendered ballot, the plaintiff exercised the franchise. If he took one ballot, he could not have another: see secs. 102, 103, and 104a. Section 93 (2) is the section under which the

Argument. defendant acted. Section 91 shews the effect of the voters' list, and section 94 is strong in the defendant's favour.

Keefer, in reply. The action is not a penal one. The section gives the right of action only to the "person aggrieved."

July 2, 1895. BOYD, C.:—

This is an action brought by a voter against the deputy returning officer at Port Arthur for the rejection of his vote at the last legislative bye-election at that place. The right to sue for the penal sum of \$400 herein claimed by the plaintiff as a "person aggrieved," is rested on the provisions of the 186th section of the Ontario Election Act, 55 Vict. ch. 3. — By that section every officer who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of the Election Act, shall forfeit to the person aggrieved by such misfeasance, act, or omission a penal sum of \$400.

Upon the evidence it appeared that the plaintiff's name was on the voters' list, and that he was a duly naturalized subject, and had a right to vote. But it also appeared to my satisfaction that the defendant believed that the plaintiff was not qualified for want of being a duly naturalized subject: that he honestly doubted the plaintiff's right to vote, and that he honestly believed in his own power to withhold what was called a "straight" ballot, and to allow the plaintiff to vote on a tendered ballot: that the only motive actuating the defendant was to do what was right, so far as he understood it, under the provisions of the Election Act.

Sub-section 2 of sec. 93, read by a layman, might appear to justify the course of permitting the plaintiff to use a tendered ballot after rejecting his vote on the ground of want of qualification. But, no doubt, the law is otherwise when a voters' list exists; that is to prevail, and, so far as the returning officers are concerned, it is conclusive: see 52 Vict. ch. 3, sec. 19.

The question for me to decide is not whether the law was followed, but whether, there being a contravention of the Act, that was on the part of the defendant a *wilful* contravention. This epithet governs in the definition of the offence, and I cannot read it as meaning merely "voluntary" or "spontaneous" in this connection. Such an interpretation would be virtually to expunge the word, and in a penal clause I have to give it such full effect as the usage of the English language permits. This course of construction is justified by such cases as *Meirelles v. Banning*, 2 B. & Ad. 909; though there are, no doubt, counter-authorities attributing less virtue to the word "wilful" than I am disposed to give on this occasion.

Judgment.

Boyd, C.

The old law was that the rejection of a vote was not the ground of a civil action unless malice was alleged and proved: *Tozer v. Child*, 7 E. & B. 377. In an old case on voting, Wilson, J., said that by "wilful" he understood contrary to a man's own conviction: *Drewe v. Coulton* [1787], in note to 1 East at p. 563.

Now, it may be that the functions of a returning officer are so changed by the use of voters' lists that he has largely, if not entirely, lost his discretionary powers of a judicial nature, and has been reduced to a ministerial officer. But if this be so, I think the effect of the section under discussion is to protect him from multitudinous private actions, unless he has acted wilfully, that is, perversely, or, in old parlance, "maliciously," as to the individual aggrieved—while it leaves him open to prosecution for the breach of any public statutory duty, whether he acts wilfully or not.

This case, therefore, turns on the meaning to be given to "wilful," and in this regard it is pointedly distinct from *Walton v. Apjohn*, 5 O. R. 65, in which the element of wilfulness is absent. I am content to rest on the authority of *Lewis v. Great Western R. W. Co.*, 3 Q. B. D. 195, accepted as a good guide in *Re Mayor of London and Tubbs*, [1894] 2 Ch. 524, as shewing that "wilful misfeasance" involves the doing of something which the actor knows will cause

Judgment. harm, or in the doing of which he is so reckless of consequences that he goes his own way obstinately or wilfully, no matter who suffers. These conditions are lacking in this case, and so the action fails, and it should stand dismissed with costs.

Boyd, C.

E. B. B.

[QUEEN'S BENCH DIVISION.]

HOBSON V. SHANNON.

Prohibition—Division Court—Garnishee Proceedings—Judgment Against Garnishee—Motion for New Trial after Fourteen Days—R. S. O. ch. 51, sec. 173-199.

The time limit for applying for a new trial in ordinary litigation in the Division Court does not apply to garnishment trials, and so long as the money remains unpaid after judgment against a garnishee, he may apply for relief either by paying into Court, or for a new trial, in the event of a new claim being made known to him.

McLean v. McLeod, 5 P. R. 467, followed.

Prohibition refused.

Statement. THIS was a motion for a prohibition to the Junior Judge of the county of York from further proceeding with an application then pending before him for a new trial in the Eighth Division Court of the county of York, in the matter of a certain plaint wherein Henry Hobson was primary creditor, Andrew Shannon, primary debtor, and the city of Toronto, garnishees.

Hobson had obtained a judgment against Shannon, and commenced these proceedings by summons issued on October 24th, 1894, and the plaint came on for trial at Weston on January 18th, 1895, resulting in judgment for Hobson against the garnishees for \$83.64 and costs.

On April 1st, 1895, notice of motion for a new trial was served on Hobson's solicitors by the garnishees, on the ground that the Standard Bank claimed to be entitled to the whole of the above sum under an assignment to it dated February 6th, 1894, the existence of which first

came to the knowledge of the garnishees on March 8th, Statement.
1895, and a copy of which was filed with the city treasurer
on March 11th, 1895.

The motion was argued on May 14th, 1895, and objection was taken to the jurisdiction of the Court to entertain the application, on the ground that the time within which such an application might be made under the Division Court Act had elapsed about two months previously, and the learned Judge proceeding to hear the motion, and intimating that he was disposed to grant the application, these proceedings were taken.

This matter was argued before BOYD, C., on June 7th, 1895.

Raney, for the primary creditor Henry Hobson, referred to R. S. O. ch. 51, sec. 145, *ib.*, secs. 144, 173; 52 Vict. ch. 12, sec. 16 (O.); *McLean v. McLeod*, 5 P. R. 467; *Mitchell v. Mulholland*, 14 C. L. J. N. S. 55; *Bland v. Rivers*, 19 O. R. 407; *Tipling v. Cole*, 21 O. R. 276, 279; *Wilson v. Hutton*, 23 O. R. 29.

Chisholm, for the garnishees, contra, referred to secs. 195, 198; *Cameron v. Allen*, 10 P. R. 192; *Hirsch v. Coates*, 18 C. B. 757; Rules of 1894, No. 283.

June 8th, 1895. BOYD, C.:—

In the Division Court Act, R. S. O. ch. 51, the limitation on moving for new trials (sec. 145) is under the head of "Judge's decision," and contemplates proceedings between the original parties to the litigation which was ended by judgment. The clauses relating to garnishment (secs. 173-199) are distinctly classed under the heading "proceedings to garnish debts." The garnishment was in this case after judgment, and then there were three parties, the judgment creditor, who is called the primary creditor, the judgment debtor is primary debtor, and the third party, the garnishee. The service of the attaching order binds

Judgment.
Boyd, C.

the debt owing by the garnishee, subject to the rights of other parties (secs. 179 and 189), and payment into Court by the garnishee is declared to be a discharge to the extent of what is paid in. If there is a contest then a summons is to be served on the garnishee, and may be served on the primary debtor, at the hearing of which judgment may be given, as in this case, against the garnishee (sec. 184). The provisions as to judgment and execution at the hearing of the garnishee summons (sec. 184) are noticeably distinct from those to be given on the hearing of the ordinary summons (sec. 145). In particular, the earlier section has been lately amended so as to provide that execution shall not issue till fifteen days after judgment, unless otherwise ordered; whereas in garnishee proceedings the execution is to issue at once if the debt is due or when it becomes due, unless otherwise ordered (see also sec. 194). If the money garnished is paid into Court it remains there subject to the rights of other parties, such as assignees of the judgment debtor, until paid out to the primary creditor. So in my opinion, so long as the money is not paid on the judgment against the garnishee, he may apply for relief either by paying into Court or for a new trial, in the event of a new claim being made known to him. An application can be made by one interested in the moneys attached even after judgment (see secs. 190, 195) to discharge the lien of the primary creditor and adjudicate as the justice of the case may require (sec. 197). And in section 198 there is a general and liberal power to adjourn the hearing of the proceedings which would include steps after judgment for any purpose, *i. e.*, having regard to the rights of interested parties within the limits of judicial discretion. All these are unique provisions, suitable to the extraordinary procedure of garnishment, but not pertinent to the well recognized methods of ordinary litigation. This elasticity is given just because of the unknown or undisclosed rights of assignees, which may remain in the dark through the omission of the primary debtor to disclose that he has assigned, or for other reasons that admit of satisfactory

explanation. These or the like reasons influenced the present Chief Justice of Ontario to decide as he did in *McLean v. McLeod*, 5 P. R. 467, that the fourteen day limit in ordinary judgments did not apply to garnishment trials. This case it is my duty to follow, and it is one which commends itself to me as well decided. It is cited approvingly in the late case of *Re Forbes v. Michigan Central R. W. Co.*, 20 A. R. 584.

Judgment.

Boyd, C.

The late amendment of the law permitting a garnishee against whom judgment has been pronounced to be examined as a judgment debtor, shews that garnishee trials are not within the scope of ordinary litigation : 57 Vict. ch. 23, sec. 18.

I think the judgment of the Division Court Judge that he had jurisdiction to open up the matter for further investigation, though after judgment, because of the appearance of a new claimant as assignee of the attached money is well founded.

I dismiss the application for prohibition, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE MACPHERSON ET AL. AND THE CITY OF TORONTO.

Arbitration and Award—Municipal Corporations—Expropriation of Land—Compensation—View of Premises—Effect of—Opinion Evidence—Potential Value of Property—Improvements—Lands Injurious Affected—Purchase Money—Interest—Land, when “Taken”—By-Law—Jurisdiction of Arbitrator.

A municipal corporation expropriated land for a road, under a by-law which described the land, and provided “that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive,” pursuant to which the corporation took possession. Upon appeal from an award by which the land-owners were allowed \$5,505 as compensation for the land taken, and \$10,095 for other lands injuriously affected, and interest on both sums from the date of the by-law:—

Held, that where an arbitrator has viewed the premises, but has not proceeded upon his view, the Court should not give any greater effect to his findings than if he had not taken a view.

2. As to the weight of evidence, there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings; and it was not for the Court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.
 3. That the arbitrator was justified in taking into account the potential value of the property, when improved, after allowing for the cost of improving it, as a means of arriving at its actual value.
- Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425; and *Boom Co. v. Patterson*, 98 U. S. R. 403, followed.
4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken.
- James v. Ontario and Quebec R. W. Co.*, 12 O. R. 624, 15 A. R. 1, specially referred to.
5. That the land must, from the date of the passing of the by-law, be deemed to have been “taken” by the city corporation, and interest was payable on the whole sum from that date.
- Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93, and *In re Shaw and Corporation of Birmingham*, 27 Ch. D. 614, followed.
6. That the arbitrator had jurisdiction to award interest.

Statement.

ON the 27th July, 1888, the council of the city of Toronto passed a by-law, No. 2164, entitled “a by-law to establish and open up Rosedale Valley Road in the wards of St. Paul and St. David,” whereby, after reciting that it was desirable and necessary to open up and establish a public highway from Yonge street easterly and southerly to the river Don, the council proceeded to enact, “that a public highway or street is hereby established and opened

up along the line of the Rosedale creek from Yonge street Statement.
easterly and southerly to the river Don, to be known and designated as Rosedale Valley Road," and to describe the road by metes and bounds, and to provide "that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive * * and be forthwith opened up, graded, fenced, and otherwise improved so as to render the same fit for the use of the general public under the direction of the city engineer," who was duly authorized, with his servants and workmen, to take possession of the same, and grade, fence, and improve it. The city corporation thereupon took possession of the land required for the road, as described in the by-law, including certain lands vested in William M. Macpherson and others, as trustees, and such lands were then and afterwards used as a public highway.

The corporation offered the landowners \$2,600 as full compensation for the land taken and the damages necessarily arising from the expropriation, but this was refused, and Edward Morgan, Esquire, was, by an order made in the Court of Appeal, under sec. 487 of the Consolidated Municipal Act, 55 Vict. ch. 48 (O.), appointed sole arbitrator between the parties to award and determine the amount of compensation to be paid. The evidence and arguments before him were set forth at great length.

On 11th March, 1895, the arbitrator made his award, by which he found, awarded, and determined as follows:—

1. That the block of land in question had a frontage on the east side of Yonge street of 335 feet, 6 inches, running southward from the south-east angle of North Drive and Yonge street, and that that frontage was capable of being adapted and improved for building sites, at a depth of 100 feet, with a lane 12 feet wide in the rear, and that there was also an available front for building purposes on North Drive, commencing at the distance of 112 feet east from the easterly limit of Yonge street, and running easterly 751 feet.

2. All parties assenting thereto, that the 27th day of

Statement. July, 1888, was the date as of which the claimants were entitled to have their compensation assessed and determined.

3. That on that date the claimants' Yonge street frontage had a marketable value of \$60 per foot front at the depth of 112 feet, and that for the 66 feet of such frontage taken by the city, they were entitled to be paid \$3,960.

4. That the claimants' lands of the Yonge street front on the north and south sides of the expropriated piece, to the extent of 53 feet on the north side and 75 feet on the south, were injuriously affected by the taking of the 66 feet, and the damage thereto was at the rate of \$50 per foot front, making a total damage of \$6,400.

5. That the claimants' frontage on North Drive was injuriously affected by the expropriation, to the extent of 100 feet, and the damage thereto was at the rate of \$20 per foot frontage, making a total damage thereto of \$2,000.

6. That the value of the residue of the lands expropriated, amounting to $1\frac{3}{16}$ acres, was on the date aforesaid of the value of \$1,500 an acre, and that the claimants were entitled to be paid therefor \$1,545.

7. That the lands of the claimants lying to the south of the expropriated piece named in the preceding paragraph, and containing $1\frac{4}{7}$ acres, were injuriously affected by the expropriation to the extent of 60 per cent. of the value thereof, which value was \$1,500, making a damage of \$1,350.

8. That the portion of the interior land lying between the part expropriated and Gibson's lane, and containing $\frac{1}{16}$ of an acre, had at the date aforesaid a value of \$1,500 per acre, and was injuriously affected to the extent of 25 per cent. of such value, making the damage thereto \$345.

9. That the residue of the claimants' lands had not been injuriously affected by the expropriation, and that no portion of the block had been benefited by the expropriation, nor had the claimants derived any advantage, within the meaning of the Municipal Act, from the expro-

priation, or from the establishing of the Rosedale Valley Road. Statement.

10. And therefore that the claimants were entitled to be paid by the corporation for the value of the lands taken, entered upon, and used by the corporation, and also for damage to lands of the claimants injuriously affected, the sum of \$15,600, as made up of the items specified in paragraphs 3, 4, 5, 6, 7, and 8, together with interest thereon at six per cent. from the 27th July, 1888. And he awarded, ordered, and adjudged that such sum and interest should be paid to them by the corporation of the city of Toronto.

From this award the corporation of the city of Toronto appealed, upon the following grounds :—

1. That the arbitrator during the course of the arbitration took a view of the premises, but had not in his award put in writing a statement as required by the statute.

2. That the award was against the evidence and the weight of evidence, and the damages awarded were excessive ; that the Yonge street frontage was not capable of being adapted and improved for business purposes, and had no marketable value on the 27th July, 1888 ; that in finding the value of the Yonge street and North Drive frontages the arbitrator had not taken the market value of the property in the condition in which it then stood, as he ought to have done, but had erroneously estimated the probable cost of making the frontages marketable property, and deducted that sum from the estimated value of the property in an improved condition, and treated the balance as the value of the frontages, thus giving the property the benefit of a large expenditure of money not actually made, and treating it as then in a marketable condition, in which it was not, and in which it could not, as the evidence shewed, have been placed before a great fall in the market value of lands took place ; that the Yonge street and North Drive frontages ought not to have been valued as suitable for business or residential purposes, but ought to have been valued by the acre, to-

Statement. gether with and at the same or a less price than the lands in the rear; that none of the lands not actually taken were injuriously affected, and no damages ought to have been awarded on that ground.

3. That the compensation ought to have been awarded according to the evidence of the value of the property at the time it was taken, in the condition in which it then was, and such has not been done.

4. That interest ought not to have been awarded to the claimants upon the amount of compensation or damages ascertained for the land taken, or for the injury to the lands injuriously affected; the claimants were not impeded or hindered by the corporation in ascertaining the amount of compensation, and the delay was not due to anything done or omitted to be done by the corporation, and interest, therefore, ought not to be given against them.

5. That the arbitrator had no jurisdiction to award interest.

The appeal was argued before STREET, J., in Court, on the 25th April and 5th June, 1895.

J. B. Clarke, Q. C., for the appellants. The arbitrator has valued the land as improved land and deducted the estimated cost of filling it in. I submit that was wrong. No evidence of its value in its actual position was given on the part of the landowners. Then, the value put upon the land taken and also the amount assessed for the land said to be injuriously affected are grossly extravagant and not warranted by the evidence. Then, the arbitrator has allowed interest from the date of the by-law up to the date of the award, nearly \$7,000. There should be no interest before the award, and the arbitrator had no power to allow interest at all. In his award he makes a distinction between compensation for land taken and damages for land injuriously affected. If interest is allowed at all, it should certainly be only upon the former. Interest can be recovered only upon a contract or as damages for wrongfully withholding money after it should have been

paid: Perley on Interest, p. 5. Here there was no contract or bargain for interest, and it could not be allowed as damages in a case of this kind: *Caledonian R. W. Co. v. Carmichael*, L. R. 2 H. L. Sc. 56, 66; *Webster v. British Empire Mutual Life Assurance Co.*, 15 Ch. D. 169; *London, Chatham, and Dover R. W. Co. v. South-Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A. C. 429; *Hill v. South Staffordshire R. W. Co.*, L. R. 18 Eq. 154; *Phillips v. Homfray*, 44 Ch. D. 694.

H. J. Scott, Q. C., (with him *H. C. Boulton*), for the land-owners. There is evidence of the actual value of Yonge street and North Drive frontages. As to the values determined by the arbitrator, there is plenty of evidence to shew much greater values. The arbitrator had to find upon conflicting evidence, and the Court will not interfere. The only way the arbitrator could possibly estimate the value of the land to the owner was the way which he adopted, of valuing it as if filled up, and deducting the expense of filling. He was fully justified by authority: *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425; 3 Sedgwick on Damages, 8th ed., sec. 1076 *et seq.*; *Boom Co. v. Patterson*, 98 U. S. R. 403; *Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Moore v. Hall*, 3 Q. B. D. 178; *Holland v. Worley*, 26 Ch. D. 578; *Martin v. Price*, [1894] 1 Ch. 276. As to the question of interest, I point out that the parties substantially stand in the position of vendor and purchaser—the owner an unwilling vendor. The severance caused the damage which has been allowed for, and that damage is, in effect, part of the purchase money of the land taken. Interest must run from the time the purchaser takes possession, that is, when the land is “taken,” which is the date of the by-law: *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93; *Re Pigott and Great Western R. W. Co.*, 18 Ch. D. 146, 151; *In re Shaw and Corporation of Birmingham*, 27 Ch. D. 614; Sedgwick on Damages, 8th ed., secs. 313, 318; *James v. Ontario and Quebec R. W. Co.*, 12 O. R. 624, 15 A. R. 1.

Clarke, in reply. The scope of the reference does not authorize the allowance of interest.

Argument.

Judgment. June 11, 1895. STREET, J.:—

Street, J.

I was not asked to consider the first ground taken on the notice of motion, namely, that when an arbitrator proceeds partly on a view, he is required by law to "put in writing a statement thereof sufficiently full to allow the Court to form a judgment of the weight which should be attached thereto." The arbitrator here states that, at the request and in the presence of the parties, he viewed the premises, but he does not in any way state that he has proceeded partly on such view, nor is it shewn that he has done so. I am inclined to think that in such a case the Court should consider only the evidence taken before him, and should not give any greater effect to his findings than if he had not viewed the premises. The second and third grounds depend in a large degree upon the weight to be attached to the evidence taken before the arbitrator. My examination of the evidence satisfies me that there was ample testimony to warrant the learned arbitrator, if he gave credit to it, in the findings at which he has arrived. It is true that a large mass of evidence was given on the part of the city which would have warranted an award for a very much smaller amount, but I am unable to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.

Objection, however, is specially taken to the principle upon which the values of certain portions of the property taken or affected were arrived at. These lands had at the time of the passing of the by-law no frontage upon which buildings could be erected, because of the sharp descent of the land in question from the streets upon which it fronted. The evidence given to the arbitrator on behalf of the land-owners was as to the value of level land in the immediate vicinity of the land in question fronting upon the same street, and as to the value that the frontage in

question would have if it were filled in so as to make it as level as the adjoining property. Then, much evidence was given as to the feasibility and cost of filling in the land in question so as to make it suitable for building; and the evidence on the part of the landowners shewed a large margin of value or profit after deducting the cost of filling in. It is objected on behalf of the city that no evidence was given of the value of the frontage in the actual state in which it was at the time the by-law was passed, and that the evidence given was based upon a state of things which might never happen.

I think that this objection is one which should not be allowed to prevail. It is evident, I think, that the premises to which the objection relates undoubtedly had a marketable money value at the time the by-law was passed, although they were not, in the position in which they then stood, useful for any purpose. It was also shewn that by the expenditure upon them of the money required to fill them in they would become marketable as building lots, and that it was a common practice in the city to fill in similar lots for the purpose of making them available for building purposes. Under these circumstances I think the arbitrator was justified in taking into account the potential value of the property when improved, after allowing for the cost of filling it in, as a means of arriving at its actual value. Otherwise, he would have been driven to say that, the property in its existing shape not being useful for any purpose, he must refuse to allow anything for it, because it might never be filled in, although by filling it in the owner might make a large sum out of it.

The plain principle of justice of allowing for a potential value has been acted upon in England, Canada, and the United States, and I cannot say it should be departed from in the present case: *Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435; *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425; *Boom Co. v. Patterson*, 98 U. S. R. 403; Cripps on Compensation, 3rd ed., p. 127; 3 Sedgwick on Damages, 8th ed., sec. 1085, p. 297.

Judgment.

Street, J.

Judgment.

Street, J.

The fourth ground taken in the appeal relates to the allowance of interest. It is objected that interest ought only to run from the date of the award; but, if allowed from the date of the by-law, at all events it should be limited to that part of the award which has been allowed as purchase money, and not to that part of it which has been allowed as damages for land injuriously affected.

Taking the last of these points first, I think that the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken within the meaning of the decisions. The learned arbitrator in paragraph one of his award describes the block of land in question in the reference and describes its capabilities for conversion into building sites as it was before the highway in question was laid out. He then proceeds, in the paragraphs numbered from 2 to 8, inclusive, to describe what portion of this block has been taken for the highway, the value of the land actually taken, and the effect upon the value of the remainder that the abstraction of the parts taken and their conversion into a highway has been estimated by him to have. In *James v. Ontario and Quebec R. W. Co.*, 12 O. R. 624, affirmed 15 A. R. 1, it is laid down that in fixing compensation to a landowner for lands expropriated by a railway, the rule is to ascertain the value of the land of which it forms part before the taking, and the value of such land after the taking, and deduct one from the other, the difference thus arrived at being the value to the owner of the part taken. This, I understand from the award, is practically the manner in which the arbitrator has proceeded here, for he states that the lands not taken are injuriously affected by the taking to the extent stated by him in his award. And a reference to the argument before him of the counsel for the city shews that he was specially asked to find separately as to the lands injuriously affected, in order that it might appear exactly what the city had acquired a right to take, to have, and to do under the award.

Treating the whole amount awarded as purchase money, and no part of it as mere damages, the question next to be considered is the date from which interest should have been allowed. The arbitrator has allowed it from the date of the passing of the by-law, and I think that upon the authorities he was right in doing so. The effect of the passing of this by-law was to prevent any dealing with the property by the landowners from the time it was passed and to vest it immediately in the corporation as a public road, under the 527th section of the Municipal Act. I think the land must, therefore, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and the authorities binding upon me declare interest to be payable from that date: *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93; *In re Shaw and Corporation of Birmingham*, 27 Ch. D. 614, 619; *James v. Ontario and Quebec R. W. Co.*, 12 O. R. 624; 1 Sedgwick on Damages, 8th ed., sec. 318, p. 464.

The landowners being entitled to interest according to these authorities, the arbitrator had jurisdiction to award it.

The appeal must be dismissed with costs.

E. B. B.

Judgment.

Street, J.

[COMMON PLEAS DIVISION.]

MORGAN V. HUNT ET AL.

Life Insurance—Foreign Benevolent Society—Policy—Conditions not on Face—Rules of Society—52 Vict. ch. 32, sec. 4 (O.)—51 Vict. ch. 22, sec. 2 (O.)—Beneficiaries—Right of Society to Limit to Certain Class—Substitution of Others by Will.

A policy upon the life of the plaintiff's deceased husband was issued before his marriage by a foreign benevolent society not incorporated or registered under any Act of this Province, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured married after the date of the policy, it *ipso facto* became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this and another insurance, subject, however, to the payment of his debts :—

Held, that the policy was capable of being controlled by conditions not set out upon its face, because sec. 4 of 52 Vict. ch. 32 (O.), amending the Ontario Insurance Act, R. S. O. ch. 167, applies only to the companies to which the latter Act applies; and as the insurance and the rights of the parties under it did not depend upon anything contained in the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vict. ch. 22, sec. 2 (O.); and, therefore, the binding terms of the contract were to be found upon its face and in the rules of the society, which formed part of the contract :—

Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts.

Statement. AN action brought by the widow of John W. Morgan, in his lifetime of the town of Palmerston, in the Province of Ontario, railway conductor, against the executors of his will and the beneficiaries thereunder other than the plaintiff herself, for a declaration that she was entitled to the sum of \$1,200, less proper disbursements for the funeral expenses of the deceased, freed and discharged from any claims of the defendants.

The statement of claim alleged :

(1) That the deceased, prior to the 3rd April, 1890, be-

came a member of the Brotherhood of Railway Trainmen, Statement.
a benevolent society incorporated under the laws of the United States, with its head office at Galesburg, in the State of Illinois, and a subordinate lodge at the town of Palmerston, Ontario.

(3) That the Grand Lodge of the society granted a benefit policy of insurance, dated 3rd April, 1890, on the life of the deceased, which provided that the benefits under the same at his death should be paid to his mother, if living, and if not, to his executors or administrators, in trust, however, for and to be forthwith paid over to his heirs-at-law, and which was issued upon the expressed conditions that the deceased should comply with the constitution and all the by-laws, rules, and regulations of the society.

(4) That such policy was issued under the constitution, rules, and by-laws of the society, the provisions of which affecting the questions in dispute, were the following :

Section 37. The Grand Secretary and Treasurer shall issue to each member a benefit policy, which shall provide for the payment upon such member's death or total disability of such sum as may be justly due, etc.

Section 38. Such benefit policies shall be in all respects deemed to be made under and to be interpreted and construed in accordance with the laws of the State of Illinois; no action at law or in equity shall be begun upon any such policy except in the Court holden in that State.

Section 39. Such benefit policy shall be payable only to the wife, the affianced wife, blood relation of, or a person dependent upon, the assured, and shall not be willed, assigned, or otherwise transferred to any other person than those enumerated.

Section 41. Where marriage is contracted after the issuing of the policy, and it becomes payable through death, it shall be paid to the widow, or, in event of her death, to their joint issue, if any, unless otherwise ordered after date of such marriage. All transfers of policies shall be recorded in the membership and policy register of the sub-

Statement. ordinate lodge and in the grand register, and they shall be of no effect until so recorded.

Section 42. Upon the death of a brother in good standing, the person or persons named in the policy (except as otherwise provided in sec. 41) shall be entitled to receive from the beneficiary fund the sum of \$1,200.

(5) That the constitution, rules, and by-laws were not contrary to the laws of the State of Illinois, but were permissible thereunder.

(6) That at the time of the issuing of the policy the deceased was an unmarried man.

(7) That his mother died in November, 1890; he married the plaintiff on the 26th September, 1893; and died on the 26th June, 1894, leaving him surviving the plaintiff, his widow, and his posthumous child.

(8) That the deceased never made any transfer or assignment of the policy, but on the 19th April, 1894, made his will, by which he directed that his funeral charges and just debts should be paid by his executors out of his personal estate, and proceeded: "2. I give and bequeath unto my wife \$1,000 on my life insurance in the Brotherhood of Railway Trainmen, or whatever the amount of policy bears at the time of my death; and also \$750 which I have on my life insurance with the G. T. R. Providence Society, with the conditions that said mentioned funeral expenses shall be paid by my executors out of the proceeds of the said mentioned policies; and I hereby declare that the proceeds accruing from said policies made for my said wife shall be accepted by her in full satisfaction of her claim to dower out of my real estate, of which I have been or now am or shall be seized, possessed, or entitled." By clause 3, he gave to his four sisters (defendants) the proceeds of a mortgage. By clause 4, he gave to one sister all his real estate in the town of Palmerston absolutely if he should die without issue, but for her life if he left issue, and then to his issue. By clause 5, he gave his household furniture to two of his sisters.

(9) That probate of this will was granted to the defendants Hunt and others, the executors named therein.

(10) That the amount payable under the policy was *Statement.*
\$1,200.

(11) That the deceased owed certain debts at the time of his death, and left a considerable amount of real and personal property.

(12) That the defendants, or some of them, contended that the moneys payable under the policy should be applied by the executors in paying and satisfying all the debts of the deceased, including a mortgage on his real estate.

By their statement of defence the defendants (1) admitted the statements of fact contained in the statement of claim to be true, with certain exceptions.

(6) Alleged that the estate of the deceased consisted of (a) a policy of life insurance in the Grand Trunk Insurance and Provident Society for \$700, the proceeds of which the plaintiff received; (b) the policy in question in this action; (c) the mortgage referred to in clause 3 of the will; (d) a house and lot in Palmerston worth about \$1,500; (e) some household furniture of little value; (f) some money on hand at his death, about \$100.

(10) The defendants submitted that the will constituted in effect a transfer or assignment of the policy

(11) They also submitted that the deceased, having made his will after his marriage, had, under sec. 41 of the constitution and rules of the society, by his will "otherwise ordered" after the date of his marriage, within the meaning of that section; and they claimed that his executors were entitled to receive the proceeds of the policy, under the provisions of the will, to be disposed of by them according to the terms thereof.

The plaintiff moved for judgment on the pleadings, and the motion was argued before STREET, J., in Court, on the 26th April and 5th June, 1895.

H. J. Scott, Q. C., (with him *D. Robertson*), for the plaintiff. The Ontario statutes may be referred to: R. S. O. ch. 136, secs. 3, 4, 5; 51 Vict. ch. 22; 53 Vict. ch. 39, secs. 3, 5; 56 Vict. ch. 32, sec. 10, sub-sec. 1.

Argument. This insurance when effected was one which might become an insurance in favour of a future wife. The provision made in the policy was revoked by the marriage. The will did not affect the rights of the plaintiff. At marriage she became entitled as upon an executed trust in her favour, apart from the statute. In addition to that, under the provisions incorporated in the policy, he could not vary it as he attempted to do by his will. The will did not operate to transfer the policy, the transfer not being registered as required by sec. 41 of the constitution, and not being in favour of one of the persons named in that section. I refer to *Mingeaud v. Packer*, 21 O. R. 267, 19 A. R. 290; *Re Eaton*, 23 O. R. 593; *Neilson v. Trusts Corporation of Ontario*, 24 O. R. 517; *Simmons v. Simmons*, *ib.* 662; *Re Grant*, 26 O. R. 120.

Aylesworth, Q. C., for the defendants. The real contest is between the widow and the sisters. The scope of the will is to provide that the estate shall be distributed between the widow and the sisters; the widow to have the policies, and the sisters the mortgage. Therefore, the will practically makes an apportionment of the amount by which the policies are reduced by payment of debts. The testator had a right under sec. 39 of the constitution so to deal with and apportion these insurance moneys. Also, under sec. 41, he "otherwise ordered" by the will. By 55 Vict. ch. 39, sec. 37 (O.), the older amendment of 51 Vict. ch. 22, secs. 1 and 2 (O.), is repealed, and sub-sec. 1 provides that R. S. O. ch. 136 shall apply. There is power to vary under sec. 6 of R. S. O. ch. 136, as amended. *Re Grant*, 26 O. R. 120, does not affect this, if it is viewed as an apportionment between the widow and the sisters. A testator may apportion by will: *Re Lynn*, 20 O. R. 475. There was no writing declaring the policy to be a trust for wife or children, and it must go for payment of debts as usual.

Scott, in reply. Sisters are not within the purview of our statute.

June 12, 1895. STREET, J.:—

Judgment.

Street, J.

The society which issued this certificate is the Brotherhood of Railway Trainmen, and is not, or was not at all events in 1890, when the certificate was issued, incorporated or registered under any Act of this Province, and therefore none of the provisions of our Benevolent Societies Act, R. S. O. ch. 172, are applicable to it. It was, however, at the time of the issuing of the certificate, as appears from the admissions in the pleadings, a benevolent society doing business under the laws of the State of Illinois, and, so far as appears, not requiring a license here: therefore, the certificate could be controlled by conditions not set out in full upon its face, because sec. 4 of 52 Vict. ch. 32 (O.) only applies to the companies to which R. S. O. ch. 167 applies: see sec. 3 of 52 Vict. ch. 32 (O.), and sec. 3 of R. S. O. ch. 167. The insurance, and the rights of the parties under it, do not appear to depend upon anything contained in R. S. O. ch. 136, and it appears unnecessary, therefore, to consider whether it is brought within the scope of that Act by sec. 2 of 51 Vict. ch. 22 (O.)

In my opinion, the binding terms of the contract are to be found upon its face and in the rules of the society, which are admitted upon the pleadings to form part of the contract.

The insurance money was payable by the terms of the policy to the mother of the insured, and, in the event of her death during his lifetime, then to his executors or administrators upon trust for his heirs-at-law. The mother died in November, 1890.

By the 41st by-law, where the insured marries after the date of the policy, it *ipso facto* becomes payable to the wife in the event of her surviving her husband, subject to his right to make another disposition. Here the insured married after the date of the policy, and his wife survived him. She, therefore, becomes entitled to the insurance money (for she has survived him) unless he has made some other disposition of it. The words of the by-law are:

Judgment. "It shall be paid to the widow * * unless otherwise
Street, J. ordered after date of such marriage."

It is contended by the executors and by the other defendants, sisters of the deceased, that by his will the insured "otherwise ordered."

By his will the insured purported to give to his widow the amount of this insurance, and \$750 upon another insurance in the Grand Trunk Insurance and Provident Society, subject, however, to the payment of his debts, which, it is said, are a considerable amount. This is equivalent to a bequest of a portion of these insurance moneys equal to the amount of his debts to his executors for the purpose of paying his debts, and of the balance only to his widow. Under by-law 39, however, the policy can be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and must not be willed, assigned, or transferred to any other person. Under the terms, therefore, upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society would properly have refused to treat his will as binding upon them in opposition to the terms of their contract with the insured. They have paid the money over to be disposed of according to the terms of the insurance contract as they may be interpreted by the Courts. There is no question here of the rights of creditors, because it is stated that there is ample property to pay the debts. The question is only whether a certain other part of the estate of the insured should be exonerated at the expense of the wife, who takes under the by-laws of the society, and, in my opinion, the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and that, therefore, the money belongs to the widow free from the obligation to pay debts.

Questions may arise as to the right of the widow to take the money payable under the Grand Trunk Insurance and

Provident Society's policy, if she refuse to accept the terms of the will, but no such questions are raised here. Judgment.
Street, J.

The parties have arranged the question of costs between themselves, and therefore I make no order as to costs.

E. B. B.

[QUEEN'S BENCH DIVISION.]

MOLSONS BANK V. COOPER ET AL.

*Collateral Security— Payments on—Credit on Principal Debt—Judgment—
Election—Res Judicata.*

The plaintiffs gave the defendants a line of credit "to be secured by collections deposited," in pursuance of which notes of defendants' customers were from time to time deposited by defendants with plaintiffs as collateral to the defendants' own notes. These collaterals at maturity were dealt with by defendants, and when paid the proceeds went to their credit and were at their disposal. The defendants failed and plaintiffs recovered judgments against them on the earlier maturing notes of the defendants. Both before and after such judgments the plaintiffs had collected on the collaterals large sums, considerably less than their whole claim, which they carried to a suspense account, and refused to credit any part on their judgments. An issue was directed on the application of defendants to try whether plaintiffs had received any payments which they should have credited on the judgments, and judgment therein was given in the plaintiffs' favour. Subsequently the plaintiffs brought this action for the balance of their claim and refused to credit the collateral suspense account:—

Held, that the decision in the issue although *res judicata* was not conclusive in this action, and that the plaintiffs' course in those proceedings amounted to an election to apply the amount of the suspense account upon that portion of the debt not then due and that they were bound to credit the amount of the suspense account in this action.

THIS was an appeal from the judgment of ROSE, J., in Statement. an action brought by the Molsons Bank against the firm of Cooper & Smith.

The following statement of facts is taken from the judgment in the Divisional Court of STREET, J.:—

The defendants, a wholesale firm, were customers of the plaintiffs, and kept their account at the Toronto office of the plaintiffs. On 13th June, 1891, in response to an application for a line of credit, the plaintiffs' manager wrote

Statement. to the defendants as follows: "I am pleased to inform you that our Board have granted you a line of credit to \$150,000, to be secured by collections deposited—rate six per cent. The meaning of the above is not that the advance shall be fully covered by collections, but as near as you can."

The plaintiffs then advanced to the defendants large sums of money upon their notes, and the defendants handed to the plaintiffs from time to time numbers of their customers' notes as collateral security. These collateral notes were entered in a book, which was headed as follows: "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made to us by the bank in discounts and overdrafts, signed by defendants."

As the collateral notes matured, they were from time to time withdrawn by the defendants for collection; other similar notes being substituted for those withdrawn. In 1893, the defendants stopped payment, and subsequently the plaintiffs recovered judgments against them upon notes then overdue for \$83,000 or more, and placed executions in the sheriff's hands: other creditors obtained judgments also against the defendants and placed executions in the sheriff's hands. The sheriff seized and sold goods of the defendants, but the amount was insufficient to pay all the executions in full, and he proceeded to a *pro rata* distribution under the Creditors Relief Act.

Some of the other creditors disputed the amount of the plaintiffs' claim, insisting that it should be reduced by the amount of the collections upon the collateral securities made before and after the judgment was recovered. The defendants also applied in Chambers to have satisfaction *pro tanto* or in full entered upon the judgments by reason of the payments received by the plaintiffs upon these collateral securities. The latter motion came by way of appeal or adjournment before the Divisional Court of the Queen's Bench Division, who directed an issue styled *Cooper v. Molsons Bank*, to be tried to determine whether before

or since the recovery of the judgments the [plaintiffs had received any payments which ought to be applied in whole or in part of the judgments or any of them. A similar issue styled *Mason v. Molsons Bank*, was directed to be tried in the contestation made by the other creditors. Both issues were tried before ROSE, J., on 13th April, 1894, who, on 20th April, 1894, delivered the following judgment:—

ROSE, J.:—

I do not find any agreement that the bank was to collect the notes deposited as security for amounts advanced under the letter of the 13th of June, granting a line of credit up to \$150,000, and apply such collections as made in payment of such advances.

I find that the agreement was that the firm of Cooper & Smith were to secure any advances made by depositing customers' paper, or, as put in the letter, "by collections deposited;" and that when any of such deposited paper matured, it was the duty of the firm to look after it, and this they did by withdrawing the paper from the wallet in which it was placed for deposit in the bank, and either received the amount of it from the customer direct or placed it in the bank for collection. That if such paper was collected by the firm, the proceeds were not in any wise controlled by the bank, but were either deposited by the firm to their credit, or otherwise disposed of as they might desire. If the paper was collected by the bank, the amount was placed to the credit of the firm's account, and was at their disposal; but the proceeds of such paper, whether collected by the firm directly or through the bank, was in no wise treated as security for the advances made under the letter of the 13th of June. On the contrary, whenever any paper was withdrawn by the firm from the wallet, it ceased to be security. It was the duty of the firm to place in the bank all the customers' paper they could procure so as to cover as nearly as possible the advances made.

Judgment.

Rose, J.

It seems to me that such paper so deposited, was regarded by both parties as security available for the whole account, if at any time, by reason of misfortune, the firm became unable to meet their obligations to the bank. At such moment the right of the firm to withdraw any paper would cease, and the bank would become entitled to hold it, or the proceeds, if paid, as security for the whole account, and not for any particular part or portion thereof; and I think it then became proper for the bank to open a suspense account to the credit of which should be carried all moneys realized from the payment of any of such deposited paper.

After the account was thus closed for the purpose of liquidation, I think the firm ceased to have any control over either the deposited paper or the proceeds thereof until they were in a position to offer to the bank payment in full of the advances. To enable the firm to make such payment in full, I have no doubt they might direct the bank to credit all moneys received in payment of such deposited paper to the account for advances, or in other words, upon payment to the bank of the sum which would equal the difference between the total amount of advances and the amount received from collections of the deposited paper, the firm would become entitled to a receipt in full and to have delivered to them any paper or other securities then held by the bank.

The fact that the bank had recovered judgment for a portion of the advances, would not give the firm any new rights, and if to credit any portion of the moneys received from collections of the deposited paper would for any reason be a detriment to the bank, it seems to me an *a fortiori* case that the firm could not require such appropriation.

Nor can I see that the creditors of the firm have any higher right than the firm, or any right to require the bank to apply any moneys in hand to the payment of judgments obtained against the firm for any portion of the advances.

The judgments once obtained and execution having been placed in the sheriff's hands, I think the right of the bank to a *pro rata* share became then established, subject to the judgment debts being reduced by payment before payment by the sheriff under the Creditors Relief Act.

Judgment.

Rose, J.

This disposes of all the bank's claim under such Act except under the judgments against the firm as endorsers on the deposited paper.

So long as such judgments stand unsatisfied, I see no reason why the bank may not claim a *pro rata* share in respect of them. I have nothing to do with the propriety of such judgments—on the issues referred to me. I assume them to be regular and valid, and if unpaid, the bank must share in respect of them.

There are two judgments against the firm as endorsers upon such deposited paper, and such judgments also include amounts advanced to the firm. If any of such deposited notes have been paid by the parties primarily liable, I do not think the bank is entitled to a dividend in respect of such notes. The judgments have been, to such extent, paid and satisfied. The amounts thus paid have no doubt been carried to the credit of the suspense account as above stated.

In arriving at the above conclusions, I have followed what I believe to be the principles laid down in *Eastman v. The Bank of Montreal*, 10 O. R. 79; *Young v. Spiers*, 16 O. R. 672; *Bowerman v. Phillips*, 15 A. R. 679; and *Commercial Bank of Australia v. Wilson*, [1893] A. C. 181, especially at page 185. Of course the bank can be paid from all sources only 100 cents on the dollar.

The parties will be able, I hope, from the above expressions of opinion, to make the necessary application of credits, when I will enter formal directions for judgment on the record.

So far as I have any power over the costs, I think the bank should have their costs, as they have substantially succeeded. The payments made upon the deposited paper upon which judgments were obtained, were at the date of the contestation comparatively trifling.

Statement.

[The learned Judge in the Divisional Court then continued his statement of facts as follows:]

The formal finding endorsed upon the issue in *Cooper v. Molsons Bank*, was that the defendants in that issue had not either before or since the recovery of the judgments in question, received any payments, which either at the time of the receipt of the same, ought to have been, or ought now to be applied in satisfaction in whole or in part of the said judgments or any of them.

Another action was begun later in 1893, for a further note of \$5,000 ; which action is still pending.

The present action was begun on the 2nd of June, 1894, to recover judgment for \$50,000 upon certain overdue notes representing the balance of the claim of the bank which had not been included in the previous actions.

The defence set up is, that the plaintiffs having refused to credit the collections amounting to some \$82,000, made upon the collaterals, upon the amount of the earlier judgments, should be obliged to do so upon the debt now sued for, or that an account should be taken of the balance remaining unpaid to the plaintiffs after deducting the amounts of the former judgments and the amounts realized upon the collaterals, and that the plaintiffs should have judgment for the balance only. The plaintiffs on the contrary insist that they are not obliged to credit any of the sums received on the collaterals, until their whole debt, after deducting the amount realized on the collaterals, should be paid.

There was no dispute at the trial about the facts. This action came on before Rose, J., at the Toronto Spring Assizes, on the 18th of April, 1895 ; and after argument, the learned Judge expressed the opinion that he was concluded by the findings and conclusion he had come to in the former issues of *Cooper v. Molsons Bank*, and *Mason v. Molsons Bank*, and he thereupon ordered judgment to be entered for the plaintiffs for \$50,000 and interest and the costs of the action.

During the Easter Sittings of the Divisional Court, the defendants moved by way of appeal from this judgment, upon the ground that the plaintiffs should have been ordered to credit the amounts received upon the collaterals upon their claim, and to recover judgment only for the balance; and upon the further ground that the learned Judge under the different circumstances of the present case, was not bound by the result of the former issues. Argument.

The appeal was argued on 25th May, 1895, before a Divisional Court composed of FALCONBRIDGE and STREET, JJ.

Foy, Q. C., for the appeal. The bank must credit the proceeds of the collections. As they did not do so on the first judgment recovered, they must do so in this action. The issue in this case is not the same as the issue previously tried by Rose, J., and by the decision in which he considered himself bound in this case. In the former issue he held that the debtors could not compel the bank, whose whole claim had not then matured, to credit on a part of their claim, the moneys collected on notes that he considered were collateral to the entire claim, both due and past due. In the present case all the bank's debt is now past due, and the time has arrived for compelling the bank to give credit for all collections. This case also differs from *Eastman v. The Bank of Montreal*, 10 O. R. 79, and other cases cited by Rose, J. There was no agreement that the collaterals were to be held until the whole debt was paid, they must be credited as collected, as the money is the property of the defendants, and that differs this case from *The Commercial Bank of Australia v. Wilson*, [1893] A. C. 181, in which there was an express agreement made with sureties. I also refer to Daniel on Negotiable Securities, 4th ed., sec. 833; Jones on Pledges, sec. 678; Colebrook on Collateral Securities, p. 365, sec. 280; *Malpas v. Clements*, 19 L. J. Q. B. 435; *Benning v. Thibaudeau*, 20 S. C. R. 110, at 114 *et seq.*

Shepley, Q. C., contra. The circumstances here are different from those in *Malpas v. Clements*, as insolvency has

Argument. intervened. A creditor is not bound to handle collateral securities to his own detriment. The plaintiffs are creditors as to their line of credit, and as to the collaterals, and as such are entitled to collect from both sources: *Bonser v. Cox*, 6 Beav. 84; *Ex p. Reed*, 3 Dea. & Chit. 481; *Ex p. Wildman*, 1 Atk. 109; *Ex p. Philipps*, 1 Mont. Dea. & De G. 232; *Ex p. The Royal Bank of Scotland*, 19 Ves. 310; *Lewis v. United States*, 92 U. S. S. C. (Otto.) 618, at 623; *Eastman v. The Bank of Montreal*, 10 O. R. 79. *Thibaudreau v. Benning*, Mont. L. R. 5 Q. B. 425, was decided upon the law of Quebec, and has no application here. In *Commercial Bank of Australia v. Wilson*, [1893] A. C. 181, the question was between two co-sureties, not between creditor and surety. The matters now in question are *res adjudicata* by the former judgment of Mr. Justice Rose upon the issue directed by this Court, which determined the very question, was between the same parties, and has never been appealed from.

Foy, Q. C., in reply.

June 12, 1895. The judgment of the Court was delivered by

STREET, J.:—

The cases which have been referred to with regard to the right of a creditor holding security to prove against the insolvent estate of his debtor without valuing his security, do not, it appears to me, affect the present question. Nor do I see that the judgment of my brother Rose in the issue of *Cooper & Smith v. Molsons Bank*, which stands unappealed against, compels the conclusion at which he felt himself compelled by it to arrive in the present case.

The plaintiffs advanced to the defendants some \$145,000 upon a number of promissory notes for round amounts made by the defendants to the plaintiffs, and they also allowed the defendants to overdraw their account current at the bank for some \$1,900. The defendants deposited, according to agreement, with the plaintiffs, a number of small notes belonging to them, which they had taken from customers who

were indebted to them. When the defendants failed, the plaintiffs sued them upon those of their own notes which were overdue, and recovered judgment for some \$80,000.

Judgment.

Street, J.

Before and after bringing those actions, the plaintiffs had received certain moneys upon the collateral notes; and after the recovery of the judgments by the plaintiffs, the defendants and some creditors with whom the plaintiffs came into competition under the Creditors Relief Act for moneys in the sheriff's hands, sought to have these moneys applied in part payment of the judgments.

My brother Rose, before whom the issues directed to dispose of this question were tried, decided that the plaintiffs were not bound to apply the moneys which they had recovered upon the collaterals, in or towards satisfaction of the judgments which they had recovered. That decision stands unreversed and unappealed from, and it is binding between the parties and upon them as *res judicata*.

All the other notes of the defendants discounted by the plaintiffs, have now become due, and this action is brought upon all of those not included in the judgments to which I have referred, excepting a note for \$5,000, to recover which, as well as for the amount of the overdrawn account, another action was brought, which is still pending.

The plaintiffs dispute their liability to credit upon the notes now sued on, any of the moneys they have collected upon the collaterals, contending that they have carried those moneys to a suspense account, where they are entitled to keep them until they are paid enough money to extinguish their entire claim, taking into account the money realized from the collaterals. The defendants insist that the plaintiffs are bound to credit the moneys received from the collaterals upon the notes now sued on, as they have elected not to apply them upon those embraced in the former actions.

I cannot see that the case of *Eastman v. The Bank of Montreal*, 10 O. R. 79, and the cases upon which it is based, support the contention of the plaintiffs under the circumstances of the present case. In the first place it is

Judgment.

Street, J.

to be observed that since the decision in the *Eastman* case, the law has been altered by statute, and a creditor coming in to prove under an assignment for the benefit of creditors, is bound to state what securities on the estate of the insolvent, he holds for his claim, and to value those securities, if any, and his proof is to be allowed for the balance only after deducting such value: R. S. O. ch. 124, sec. 19, sub-sec. 4.

In the next place the question here, is not the amount for which the plaintiffs are entitled to rank upon an insolvent estate, but the amount for which they should have judgment against the defendants upon these notes; that is to say, whether the defendants now, in addition to the sums for which the plaintiffs have judgment against them, owe to them, upon a proper accounting, any further sum, and if so, how much.

I can find in the documentary evidence of the terms on which these notes were deposited with the plaintiffs; and that is the only evidence before us—nothing to take the deposit out of the rule which should be applied to a simple deposit of notes by a debtor with a creditor as collateral security for the payment of his debt. In such a simple case, I take it that when the creditor's debt matures and he receives payment of the collateral notes, he is not entitled to say that he will carry these payments to a suspense account and recover judgment for the whole amount of his debt without crediting anything.

The object of depositing the collateral notes with the creditor, was to enable him to pay himself by collecting them if the debtor failed to pay his debt when due; and the creditor cannot without the consent of the debtor collect the notes, and then his debt being due, refuse either to pay himself or to give the money he has collected back to the debtor.

Special principles have been laid down governing this general rule when the question is one of proof against an insolvent estate; but even there the creditor is bound to credit the proceeds of collaterals realized by him before his proof is made: *In re Barned's Banking Co.*—*Forwood's*

Claim, L. R. 5 Ch. 18; *In re Oxford, etc., Hall Co.*, L. R. 5 Ch. 433; *In re Oriental Commercial Bank, Ex p. Maxondoff*, L. R. 6 Eq. 582. And as I have pointed out this rule no longer exists in this Province in the case of assignments for the benefit of creditors.

Judgment.

Street, J.

In the case of *Commercial Bank of Australia v. Wilson*, [1893] A. C. 181, to which we were referred, where two guarantors of the debt of a third person to a bank had paid to the bank a sum of money which the bank refused to accept as part payment of the debt, but only to place it at the credit of a suspense account pending proof against the bankrupt estates of other guarantors, it was held that there was nothing requiring them to credit the money upon their debt before the period provided in the agreement, and that they might, therefore, rank for the whole debt. But there the money paid them was not the money of their debtor; and there there was a special agreement providing for its retention in a suspense account; both of which important circumstances are wanting here.

There being, therefore, in my opinion, no agreement here controlling the right of the defendants to have these payments applied on their debt to the plaintiffs, and no principle of law or equity applicable to the existing circumstances of the case entitling the plaintiffs to refuse to apply them, I think we are bound to order that the plaintiffs now that their whole debt is over due shall give credit for them; and as they must be taken to have elected upon the former proceedings to apply them upon the portion of their debt not then due, they must adhere to their election and apply them accordingly.

The admissions at the hearing shew that after deducting the amount of the judgments already recovered, the collections on the collaterals are sufficient to satisfy the residue of the plaintiffs' claim, including the notes in question; the appeal should, therefore, be allowed with costs, and the action dismissed with costs.

G. A. B.

NOTE.—This case has been carried to appeal.

[CHANCERY DIVISION.]

REGINA V. GILES.

Gaming—Betting—Keeping Place Therefor—Horse-Race in Foreign Country—Criminal Code, sec. 197, 198.

The defendant occupied a tent in a village open to and frequented by the public, in which there was a telegraph wire to an incorporated race track in the United States, where horse racing and betting was legalized. In the tent was a blackboard on which were the names of the horses and jockeys taking part in the race, with the weights and the track quotations, and as the race was being run, an operator called off the progress thereof, giving the name of the winner and of the second and third horses, and marked them on the board. Duplicate tickets were furnished in the tent to applicants, which requested defendant to telegraph one B. at the race track to place a certain amount of money on a horse named by the applicant at track quotations, and upon transmission thereof, the applicant agreed to pay defendant ten cents, and that all liability on defendant's part should cease. On the tickets being handed in, one of them was stamped with the date of its receipt and returned to the applicant. The aggregate amount of the money so received was notified by telegram to B. and placed by him before the race with bookmakers on the track, B. paying defendant a percentage on the moneys received for him and ten cents on each application. B. had an agent in another part of the village, whom he furnished with money to pay any winnings by remitting same to him or giving him orders on defendant for stated sums:—

Held, that the defendant was properly convicted under sections 197 and 198 of the Code, of keeping a common betting house, the place in question being opened and kept for the reception of money by defendant on behalf of B. as consideration for an undertaking to pay money thereafter to the depositor on the event of a horse race.

Statement. THIS was a special case stated for the opinion of the Court.

The defendant was tried before the County Judge at the County Judge's Criminal Court of the County of Peel, on the 12th day of October and 9th day of November, 1894, and convicted of keeping a disorderly house, to wit: a common betting house in the village of Port Credit, in the said county, on the 25th day of July, 1894, within the meaning of sections 197 and 198 of the Criminal Code, 1892.

The evidence shewed:—

1. That on or about the 20th July, 1894, the defendant Giles took possession of and occupied a tent on a vacant lot on the corner of Brook and Park streets, in the village

of Port Credit, in the county of Peel. Some short distance from this tent, but on separate property over which Giles had no control, was Blakeley's hotel. Statement.

2. The defendant occupied the tent and kept it open from about the 20th to about the 28th July, 1894. The tent was open to the public during this time, and was frequented by Sharp and Hurst, complaining witnesses, and a number of other persons to the number of fifty or one hundred each day.

3. In this tent was a telegraph instrument with wire direct to the race track at Brighton Beach, in King's County, in the State of New York, one of the United States of America, where horse racing was actually in progress, and the said race track was shewn to be an incorporated race track under the laws of the State of New York, and horse racing thereon, during the period in question, was shewn to be legal, and bookmaking and betting on said race track was shewn to be legal during said period by the laws of the State of New York.

4. The *modus operandi* of complaining witnesses Sharp and Hurst and others who frequented said tent was as follows:—Tickets, similar to one which was attached to the case (and which is set out at the end of the case), were signed by them in duplicate and handed to Giles at a wicket in a box or stand in the tent. One part of this duplicate ticket was stamped by Giles with a rubber stamp with the words: "Received, July 25, 1894," or the date of being handed in and handed out to Sharp and Hurst, Giles retaining the other duplicate.

5. A blackboard was erected in a conspicuous part of the tent giving the names of the contesting horses in each race, the jockeys, their weights and the track quotations, that is, shewing the odds that were laid by the book-makers at the track on each horse in a race. Sharp and Hurst and others signed the ticket in duplicate some time before the start of the race, and the commission evidence shewed that the aggregate amount of money received from those signing and handing the duplicate tickets to Giles

Statement. was notified by telegram by Giles to one John Brennan at Brighton Beach race track before the horses started in each race, and the amount so notified by telegram was placed by Brennan with a bookmaker or bookmakers on said race course.

6. The commission evidence shewed that Brennan had an arrangement with one Alcock to pay to the parties entitled any moneys they had placed with the winnings of any race—which was done by Alcock, or some one representing him in the village of Port Credit, usually at Blakeley's hotel, or in some other part of the village outside of Giles's tent or premises.

7. The evidence shewed that the progress of each race was called off by the operator, and the winner and second and third horses announced, when a circle would be chalked around the name of the winning horse, and the second and third horses in the race would be chalked second and third respectively over their names on the blackboard.

8. Giles paid for the telegrams transmitted, and the expenses of his employees at the tent, and received from Brennan a percentage of ten per cent. on all moneys notified by telegraph, and also ten cents with each duplicate ticket or application, and Brennan paid Alcock a daily salary for attending to the payment of any indebtedness he might owe successful applicants, providing Alcock with cash for that purpose by handing him money in advance, remitting same to him, and giving him orders on Giles for stated sums.

The question for the opinion of the Court was as follows:

Having regard to the evidence, and the provisions of the said sections, and also the provisions of section 204 of the Code, ought the defendant to have been convicted.

The ticket attached to the case was a printed form, as follows, in which there were blanks which were filled in with the words in italics:

To J. Giles, Telegraph Agent,

Statement.

Port Credit.

Kindly notify by telegraph John Brennan, care Race Track, *Brighton Beach*, that I wish him to place for me on said Race Track \$2 on horse "*Our Maggie*," to run *first* at track quotations, if such can be obtained. And upon transmission of said telegraph notification, for which I agree to pay you Ten Cents, it is expressly agreed that all liability on your part ceases, and is at an end, and that I will look to the said John Brennan and hold him alone responsible for the amount of money, with proceeds (if any) that may be so notified by you the said J. Giles.

(*Sd.*) *D. M. Sharp.*

In Hilary Sittings, 1895, of the Chancery Division before BOYD, C., ROBERTSON and MEREDITH, JJ., *Osler*, Q. C., *Aylesworth*, Q. C., and *Murdock*, supported the motion. There is no offence proved within secs. 197 and 198 of the Criminal Code, 1892, 55-56 Vict. ch. 29 (D.). The place was not "a common betting house or room or other place" coming within any of the sub-sections of section 197. It did not come within sub-section (*a*) as being a place used, etc., for the purpose of betting between the persons resorting there and the owner and other persons mentioned in the several clauses of that sub-section; nor did it come within sub-section (*b*) as being a place, etc., for the purpose of the reception of money on any assurance or undertaking to pay money on any event or contingency relating to any race, etc., or to secure the paying, etc., by some other person of any money, etc., on any such event, for no bet was made there, and there was no receipt of any money on any such assurance, etc. The only document signed was the printed form of application signed by Sharp and Hurst, and this expressly provides that on transmission of the telegraphic despatch, all liability on defendant's part is to cease. The defendant was merely the agent to convey the money to Brennan. This is the only contract, and it clearly does not come within the section. All that was done here

Argument.

was that Sharp and Hurst paid over some money to the defendant with the request to telegraph to the United States to ascertain if a bet could be procured there. Moreover, the section only applies to an offence taking place within Canada, while the offence here took place at Brighton Beach in the United States. No bet is made until it is ascertained that there is a person in the United States desirous of making the bet, and when made it is made in the United States and not in Canada. This was no more a betting house than the post office or the express office would be from the fact of money being mailed or sent by post or express to make a bet in a foreign country : *Lyne v. Siesfield*, 1 H. & N. 278; *Williams v. Tyre*, 23 L. J. N. S. Ch. 860, Stutfield on Betting, 74-89; *Bond v. Plumb*, [1894] 1 Q. B. 169; *Reid v. Anderson* 13 Q. B. D. 779; *Knight v. Lee*, [1893] 1 Q. B. 41. Section 197 must be read in connection with section 204, which prohibits premises being used for recording or registering any bet or wager, or sale of any pool, etc., but it is expressly provided by sub-section 2 that the prohibition is not to apply in the case of any legal race to a bet made on the race course during the actual progress of the race. Here the bet was made, or to be made, on the race track at Brighton Beach during the actual progress of the race. In *Regina v. Smiley*, 22 O. R. 686, decided under sec. 9 of R. S. C. ch. 159, which enacted that everyone who became the custodian or depository of any money, etc., on any race, etc., was guilty of a misdemeanour, it was held that that section had no application to the result of a race which took place outside of Canada. This decision was based on *Wells v. Porter*, 3 Scott 141, 2 Bing. N. C. 722, where it was held that the Stock Jobbing Acts did not cover foreign stocks. See also *Regina v. Wettman*, 25 O. R. 459, which is the converse of this. In *Macleod v. Attorney-General for New South Wales*, [1891] A. C. 455, it is expressly laid down that the legislation of a colony is limited to matters within its jurisdiction.

J. R. Cartwright, Q. C., contra. Section 197 taken in

its ordinary meaning, without the aid of any cases clearly shews that this was a place for the deposit of money for betting, or, in other words, a betting house. It comes within sub-section (a) as being a place used for betting. It also comes within sub-section (b) as being a place where money was received on the assurance provided for by that sub-section. This section appears for the first time in the Code, and is taken from the Imperial Act, 16-17 Vict. ch. 119. The corresponding section in the Imperial Act was interpreted in *Regina v. Cook*, 13 Q. B. D. 377, 381, and it would be impossible to more fully answer the arguments of the other side than to refer to the language used by the Judges in that case. He also referred to *Jenks v. Turpin*, 13 Q. B. D. 505; *Regina v. Worton*, 39 Sol. J. 114, 11 Times L. R. 107; *Bond v. Plumb*, [1894] 1 Q. B. 169; *Regina v. Brown*, [1895] 1 Q. B. 119; *Regina v. Preedy*, 17 Cox C. C. 433; *Hornsby v. Ragget*, 17 Cox C. C. 428. The case of *Regina v. Smiley* was decided on sub-sec. 2 of sec. 204, and the point there was whether the race was a legal or an illegal one, while the gist of the offence here, is the keeping of a place for the purpose of betting, and it is immaterial where the race was run.

Osler, Q. C., in reply. The cases referred to by the other side are clearly distinguishable, for there betting actually took place in the places complained of, while here, as already pointed out, no bet is made at the place nor was any money deposited on any assurance given there.

March 2nd, 1895. BOYD, C.:—

This place appears to have been opened and kept for the purpose of money being received by Giles (the occupier) on behalf of Brennan (who made use of the same by availing himself of the facilities afforded thereby), as consideration for an undertaking to pay money thereafter to the depositor on the event of a horse race.

The statute does not require that the engagement to

Judgment.

Boyd, C.

pay should be personal as to the keeper of the place ; if it is arranged through his instrumentality all the mischief arises which the enactment is designed to suppress ; it does not appear to be material whether the race is run in Canada or elsewhere, so long as the disorderly place, called a betting house, is opened and maintained in Ontario.

Using the words of Lord Russell in *Regina v. Worton*, the second part of section 197 prohibits using the place for the purpose of the person using it receiving money as the consideration for a promise to pay money on any event or contingency relating to any race, horse, etc. : [1895] 1 Q. B. 227, at p. 230 ; and as put by Hawkins, J., in *Regina v. Brown*, [1895] 1 Q. B. 119, at p. 131 : It is " a common nuisance if a house is opened, kept, or used for the purpose of the occupier * * receiving merely as the consideration for thereafter paying money upon certain contingencies, or (to put it shortly) as the consideration for making a bet."

And in the same case Wright, J., says that this part of the section aims at the occupier " keeping an agency where money is received for bets to be made by his agency," p. 133.

Regina v. Smiley, 22 O. R. 686, is not in point ; it relates to a different matter which is now placed in the Code as section 204.

Regina v. Wettman, 25 O. R. 460, lacks the element which controls this case, namely, that there was no deposit of money at the place in this Province, of which complaint was made. My conclusion is in favour of the conviction which should be upheld.

MEREDITH, J. :—

What this section of the Act aims at is, plainly enough, those means by which gaming is made easy ; by which the means of betting for the mere sake of gambling, without the least possible interest otherwise in the event, is brought near to the doors of everyone. It is immaterial whether

the plunge be made respecting something in itself legal Judgment.
or illegal, moral or immoral, and whether near at hand, or Meredith, J.
as far away as can be imagined. It is the pernicious habit or practice of betting for the mere sake of winning something that is sought to be hampered; the prevention of such allurements as a betting place, such as that in question, affords to that strong inclination of so large a proportion of mankind, to risk their own, and in some cases to risk other persons, money upon the chances of a bet.

That that which this defendant did was just one—and one of the most serious and dangerous kind—of those things which this section of the Act was designed to put an end to in Canada, is obvious. The one question is, whether this case comes within the meaning of the words used in this penal enactment; whether, in short, the cunning of the persons who devised the means employed by the defendant, and those with whom he was associated, has circumvented the framers of the enactment and the purposes of it.

It is doubtless a difficult thing to frame an enactment to meet and provide effectually for all cases that may arise; and it is easy to find fault with the framers of legislation when a case arises which apparently has not been anticipated or provided for; or with legislation in which a loophole of escape from the purposes of it is proven to exist; and perhaps, therefore, one should be slow to complain of difficulties arising by reason of the frame of this enactment or the language in which it is clothed; yet one may perhaps venture to suggest that the few plain words “a common betting house is any place kept for the purpose of betting,” adding, if need be, to make the intention plainer, “or enabling persons to bet,” might have sufficed and would have covered this case, and might have been better than borrowing and transposing the very words of an Act of another country, where special circumstances may have called for the more complicated enactment in question.

But we have to deal with the section as it is, and I

Judgment. agree with Mr. Osler in his contention that this case, as
Meredith, J. stated by the learned trial Judge, does not fairly come within the first part (a) of it; but, having regard to the evident purposes of this legislation, it seems to me that it does fairly come within the second part (b): that the defendant did keep the place in question for the purpose of receiving money, in consideration of which persons paying it were to be paid money by some other person on an event of a horse race; that is to say, Giles kept the place for the purpose of receiving the money—which was then practically bet on the race—for which the person making the bet was by the ticket given to him by Giles secured payment by Brennan, Giles' partner or employer, or some one representing him in part at least out of the moneys received by Giles from persons thus betting upon the races.

The defendant was not a mere agent for the person betting, to convey his instructions or orders and money to Brennan; he received and recorded all bets in his tent; he there announced the result of the races; he directed the winners to the other associate of Brennan for payment, and that person paid the winnings, less the charges, on a notification from the defendant, or his employees, of the result, and such winnings were paid to some extent out of the moneys received by the defendant from the persons "placing bets with him." No separate bet was reported to Brennan at the race track, the aggregate of the "bets placed" only was so reported; and so the defendant's position was very different from that to which counsel likened it, a mere transmitter of message and money.

I find nothing in the cases in conflict with the finding against the defendant.

Regina v. Smiley, 22 O. R. 686, is not in point, being a decision upon a different enactment; an enactment for the prevention of betting upon certain things, namely, 'the result of any political or municipal election, or of any race, or of any contest, or trial of skill, or endurance of man or beast.' The nature of the event was a material ingredient. Even at common law a bet upon the result

of a parliamentary election was illegal. It was plain, one might think, that the political or municipal election meant, was one in Canada; and the other events being so closely connected, in the same sentence, with political or municipal elections, and the exceptions from the words of this enactment containing the words, "winner of any lawful race" and "owner of any horse engaged in any lawful race," which the Court thought clearly meant lawful according to the laws of this country, the Queen's Bench Divisional Court held that the race must be one taking place in Canada.

In this case neither the place nor the nature of the event is material, the crime is (section 198) keeping a disorderly house, that is to say—as defined by section 197—a common betting house. It is none the less disorderly and none the less a betting house because the bets are made upon things out of Canada.

It does not depend upon the legality or illegality of the thing itself. As easy means of betting, with one's own or someone else's money—as great an allurements—is provided, whether the thing upon which the bet is made is Canadian or foreign, and whether legal or illegal in itself.

I would affirm the judgment of the trial Judge upon the question reserved.

ROBERTSON, J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

TIERNAN V. PEOPLE'S LIFE INSURANCE COMPANY.

Life Insurance—Payment of Premium—Condition—Credit—Authority of Manager.

By an application for life insurance, the interim receipt and the policy, it was provided that no policy was to be in force until actual payment of the first premium to an authorized agent and the delivery of the necessary receipt signed by the general manager of the company. The general manager, who was paid by commission, made an agreement with an applicant for a policy that work done by the applicant for himself personally would be taken in payment of the first premium, and gave him a receipt for it without, however, paying the company :—
Held, that the company was not bound

Statement. THIS was an action brought by the plaintiff as executor under the last will and testament of the Rev. Joseph P. Molphy, deceased, to recover the sum of \$1,000 claimed to be due under a policy of insurance effected with the defendant company on the life of the deceased.

The action was tried before ROSE, J., without a jury, at Woodstock, on March 20th, 1895.

Osler, Q. C., and Jackson, for the plaintiff.

Hunter, for the defendants.

From the evidence it appeared that on the 3rd of April, 1893, E. J. Lomnitz, one of the general managers of the defendant company, took an application from the Rev. J. P. Molphy, for insurance for \$1,000, the premium of which was \$52.35, and on account of some work that Mr. Molphy had been doing for Mr. Lomnitz, he agreed that the first premium should be considered as paid, and he gave him a receipt therefor.

By the terms of the application, it was expressly provided that under no circumstances should the policy be in force until actual payment and acceptance of the first payment due thereon by an authorized agent of the company, and the delivery to the insured of the necessary receipt signed by the general manager.

On the 20th of April, the company issued its policy Statement. which was delivered by Lomnitz to the deceased. It stated that in consideration of the annual premium of \$52.35 being paid in advance to the company at its head office, being in the city of Toronto, on or before the delivery of the policy, and thereafter on the 20th of April in every year during the term of ten years, the company promised to pay to the executors, administrators of the insured, the sum of \$1,000, upon satisfactory proof of his death, etc.

Lomnitz and one Barwick were the general managers of the company under an agreement by deed whereby they were to receive eighty-five per cent. of the premiums and the company to receive the balance of fifteen per cent.

Lomnitz swore that he had notified the company of the terms on which the insurance was effected. The defendants denied this, and there was no memorandum in their books to shew that the \$52.35 had ever been paid to the company.

By the company's policy register the policy was marked as cancelled in October or November, 1894, but no notice of this was ever sent to the Rev. Father Molphy, who died during the latter month.

The learned Judge reserved judgment, and subsequently delivered the following judgment:—

May 3rd, 1895. ROSE, J. :—

The question left for determination was, whether the deceased had paid the first premium, and this must, I think, be answered in the negative.

There was no evidence of any services rendered which would afford a basis for a claim against either the company or the general managers.

By the contract between the company and the general managers, they, the general managers, were really appointed general agents, with authority to employ sub-agents, whom they were to pay out of the commissions

Judgment.

Rose, J.

allowed to them as general agents, and they covenanted with the company to indemnify and save harmless the company from any and all claims for commission or otherwise by such sub-agents. Even if the deceased had rendered services as a sub-agent, his claim would have been against the general agents, and they could not have paid him by crediting him with the amount of the first premium.

There was no authority expressed or implied permitting the general managers to give the deceased any such credit. What they, the general managers were bound to do if they wished to reward the deceased, was to have themselves paid the company the amount of the first premium, and there is no pretext for saying that they did so.

The terms of the conditional receipt, of the application and of the policy, all gave notice that the contract did not come into force until the company had been paid the first premium, and this not having been paid, the company never was bound.

The following cases may be referred to: *Montreal Assurance Co. v. McGillivray*, 13 Moore, P. C. 87; *Frazer v. Gore* *District Mutual Fire Ins. Co.*, 2 O. R. 416; *Western Assurance Co. v. Provincial Ins. Co.*, 5 A. R. 190; *Anchor Ins. Co. v. Pease*, 66 Barb. 360; *Life Ins. Co. v. Dovidge*, 51 Tex. 244; *Acey v. Fernie*, 7 M. & W. 151; *Browne v. Massachusetts M. L. Ins. Co.*, 59 N. H. 298.

I am indebted to counsel for the very full briefs of the decisions handed in since the argument.

There must be judgment for the defendant company, dismissing the action with costs.

G. F. H.

[COMMON PLEAS DIVISION.]

SYLVESTER V. MURRAY.

Contract—Sale of Land—Conditional Promise—Effect of.

After negotiations had taken place for the sale of a farm at \$9,500, the following contract was signed by the purchasers :—" We agree to take your farm and pay you \$9,000, and if we get along fairly well, we will give you the other \$500 as soon as we are able " :—

Held, that the provision as to the \$500 was a conditional promise which might be recovered on proof that the purchasers were of ability to pay, which the evidence in this case failed to shew.

THIS was an action tried before BOYD, C., without a Statement.
jury, at Woodstock, at the non-jury Spring Sittings of 1895.

The action was brought against George H. Murray, the administrator of the estate of William Patrick, deceased, and Andrew Patrick, to recover the sum of \$500.00, which was claimed to be the balance due on the sale of a certain farm.

On 5th March, 1891, negotiations took place between the plaintiff and William and Andrew Patrick, for the sale to them of the farm at \$9,500. On the following day the Patricks notified the plaintiff that they were not willing to carry out the purchase, when further negotiations took place, and the following agreement was signed by the Patricks :—" We agree to take your farm, lot 6, concession eleven, Blanford, and pay you nine thousand dollars (\$9,000), and if we get on well, we will give you the other five hundred dollars (\$500.00) as soon as we are able."

The purchasers, at the time paid \$25.00 on account, and were given a receipt by the plaintiff.

On April 6th, 1891, a conveyance of the land, in the ordinary short form, was executed by the plaintiff to the purchasers, the consideration therein stated being \$9,000, which the purchasers duly paid. The purchasers worked the farm until February 1st, 1894, when William Patrick died, and subsequently the farm was sold and realized some \$8,000. Evidence was given to shew that

Statement. three per cent. on the value of the farm and wages was what would be considered as doing fairly well, and that the purchasers had failed to realize anything like this.

April 20, 1895. *A. M. Macdonald*, for the plaintiff.

G. H. Watson, Q. C., for the defendants.

The learned Chancellor reserved his decision, and subsequently delivered the following judgment:—

May 27, 1895. *Boyd*, C.:—

The defendants contend that the contract here is too vague to create any liability. It is thus expressed: "We agree to take your farm and pay you \$9,000, and if we get along fairly well, we will give you the other \$500 as soon as we are able." The plain meaning of these words is that if the defendants get along fairly well, so as to be able to pay, then they will pay. That is a conditional promise which may be effectively sued upon, if it is proved that the defendants are of ability, because they have succeeded fairly well: It becomes a question of evidence, and to justify the conclusion that the defendants, as farmers, have done fairly well, many witnesses have been called. The general run of evidence is that the man should make, at least, bank interest on his capital invested (say three or three and a-half per cent.), pay wages and make a fair wage for his own work. Applying this test, the plaintiff has failed to shew that the defendants are of ability to pay.

As to the law in one of the cases cited for the defendant it is said: "Had the parties introduced into the contract proper and apt words to raise a promise to pay when the makers of the note should possess the ability to do so, it would have been a valid promise, which might have been enforced upon the happening of the stipulated condition": *Barnard v. Cushing*, 4 Met. (Mass.) 239. Though the text books are silent, the law is recognized in many cases such as *Cole v. Saxby*, 3 Esp. 159; *Davies v. Smith*, 4 Esp.

36 ; *Besford v. Saunders*, 2 H. Bl. 116 ; *Tanner v. Smart*, Judgment.
6 B. & C. 603. Boyd, C.

The action is dismissed, and as to costs, I think they may be set off against the claim for \$500, as to the balance of which the liability will still remain though it may never be enforceable.

G. F. H.

[QUEEN'S BENCH DIVISION.]

RE BALL V. BELL.

Prohibition—Division Court—Mortgage—Contract or Obligation to Indemnify—Action for Interest Only—Dividing Cause of Action—R. S. O. ch. 51, sec. 77.

The plaintiff conveyed land to the defendant subject to a mortgage, and after the maturity thereof paid the mortgagee two gales of interest since accrued, which he sought to recover from the defendant by action in a Division Court :—

Held, that there was no splitting of the cause of action within section 77 of the Division Courts Act, R. S. O. ch. 51.

Decision of ARMOUR, C.J., *ante* p. 123, reversed.

THIS was an appeal to the Divisional Court by the Statement.
plaintiff from the judgment of ARMOUR, C. J., granting a prohibition with costs, reported *ante* p. 123, where the facts are fully set out.

The appeal was argued during the Easter Sittings of the Divisional Court, before FALCONBRIDGE and STREET, JJ., on 29th May, 1895.

N. F. Davidson, for the appeal.

S. W. McKeown, for the defendant.

June 13, 1895. STREET, J. :—

With great respect I find myself after very careful consideration unable to agree in the conclusion of my Lord, the Chief Justice, that there was a dividing by the plain-

Judgment. tiff of his cause of action, and that therefore a prohibition
Street, J. must go.

The obligation into which the purchaser of an equity of redemption enters, in the absence of any express agreement with the vendor, is, that he will indemnify the vendor against liability upon the mortgage: *Waring v. Ward*, 7 Ves. 332-336; *Jones v. Kearney*, 1 Dr. & War. 134; *Beatty v. Fitzsimons*, 23 O. R. 245; *British Canadian Loan Co. v. Tear*, 23 O. R. 664.

That seems to be the precise nature of the liability imposed, whether it be treated as an implied contract or an equity independent of contract. It is true that the existence of the right to be indemnified has been held to give to the vendor a right in equity to compel the purchaser who becomes by the transaction the principal debtor as between him and the vendor to relieve his surety the vendor by discharging the debt at maturity: *DeColyar on Guarantees*, Bl. ed. 277; *Story's Equity Jurisprudence*, 2nd Eng. ed., sec. 327; *Nisbet v. Smith*, 2 Bro. C. C. 579.

But this was a right enforceable only under the *quia timet* jurisdiction of a Court of Equity before the present system, and there was no legal right in a surety to recover as damages the amount of a debt which he had not paid, unless judgment for the amount had been recovered against him: *Mayne on Damages*, 5th ed., 321, 323; *Story's Equity Jurisprudence*, 2nd Eng. ed., sec. 849; *Boyd v. Robinson*, 20 O. R. 404.

Whether a surety under the circumstances of the present case, where no claim has been made upon him by the creditor and no demand has been made by him upon his principal debtor to pay the principal debt, could bring an action to compel the latter to pay the debt appears to be questionable: *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561, distinguished in *Mewburn v. MacKelcan*, 19 A. R. 729. See also *Eddowes v. Argentine Loan, etc., Co.*, 63 L. T. N. S. 364, at p. 365.

If the surety have such a right, no doubt he could join

a claim to enforce it in the same action with one for repayment of the interest which he has been compelled to pay ; but they are rights distinct in their character, one founded upon a legal, the other upon an equitable right ; and although they both have their foundation in the same contract, to indemnify, one is based upon an actual, the other upon an anticipated breach of it.

Judgment.

Street, J.

I am of opinion, therefore, that the action in the Division Court brought by the plaintiff upon the actual breach of the contract may properly be brought there, and that the plaintiff in bringing it has not divided his cause of action, but that on the contrary, he is entitled so often as he is compelled to pay money upon this mortgage to bring an action against the principal debtor to recover it as for money paid to his use ; in other words, that each such payment which the surety is compelled to make, constitutes a new breach for which a new action may be brought.

In my opinion the appeal should be allowed with costs, and the motion for a prohibition should be dismissed with costs.

FALCONBRIDGE, J., concurred.

G. F. H.

[CHANCERY DIVISION.]

FAIRWEATHER V. THE OWEN SOUND STONE QUARRY
COMPANY.

Master and Servant—Negligence—Fellow-Servant—Liability at Common Law—Defective Appliances.

One of the directors of a quarry company, was appointed foreman of the works, with full powers of management, subject to the directors' control, and to such duties as might be delegated to him from time to time. The plaintiff, one of the company's labourers, claiming that he had sustained injury by reason of the foreman's negligence while acting under his instructions, brought an action at common law against the company :—

Held, so far as the action rested upon the liability of the company through the foreman, that there was no liability, as he was merely a fellow-servant of the plaintiff :—

Held, however, that an action might be sustained on proof of negligence of the company in not furnishing proper appliances for the quarrying operations.

Statement. THIS was an action tried before MEREDITH, J., and a jury, at Orangeville, on the 24th and 25th September, 1894.

The action was, under the common law, to recover damages for an accident caused by an explosion at the defendants' works, occasioned, as was alleged, through the defendants' negligence.

The plaintiff was a labourer employed by the defendants, who were the proprietors and workers of certain stone quarries. On the 29th of November, 1892, while the plaintiff with other labourers was engaged under the direction of one Peter Sabiston in blasting rocks from the defendants' quarries, with blasting powder and detonating caps, charged and exploded by means of an electric battery, all of which were arranged by and under Sabiston's instructions, one of the charges failed to explode, and on the plaintiff, acting under Sabiston's instructions, in attempting to drill out and remove with a heavy iron drill the explosive materials with which the blast was charged, it exploded, and the plaintiff was seriously injured.

The evidence shewed that Sabiston was one of the directors of the company, and that he was also appointed foreman of the works with full powers of management, but subject to the control of the directors, at a salary of \$100 a month, and was also subject to such duties as might be delegated to him from time to time by the directors. Statement.

The negligence complained of was in the preparation or the charge by Sabiston so that it failed to explode; and also in the plaintiff being ordered to remove the charge without the proper materials therefor, being merely furnished with an iron drill instead of one tipped with copper.

The defendants denied that there was any negligence on their part, and alleged that the accident happened by reason of the plaintiff's own negligence and want of care.

At the conclusion of the case, it was objected on behalf of the defendants that there could be no recovery against them on the ground that Sabiston was merely a fellow-servant of the plaintiff, both being engaged in the course of a common employment; and therefore no liability attached at common law.

The learned Judge reserved his decision on this point, and the evidence for the defence was entered into.

The following questions were left to the jury:—

1. Was the explosion caused by any act of negligence alleged by the plaintiff in his pleadings? A. No.

2. If so, in what did such negligence consist. No answer.

3. Might the plaintiff by the exercise of ordinary care have avoided the accident? A. He might with proper instructions.

4. Was the plaintiff aware, or ought he to have known the risk he incurred in acting as he did? A. We think he was not aware, but should have been.

5. Did he voluntarily incur the risk? A. No.

6. What damages should the plaintiff have from the defendants if he is entitled to recover in this action? A. \$2,500.

Statement.

The learned Judge directed judgment to be entered for the defendants upon the whole case, that is, on the motion for nonsuit and the findings of the jury ; and he dismissed the action with costs.

The plaintiff moved on notice to set aside the judgment entered for the defendants, and to have the judgment entered in his favour, or for a new trial.

On February 26th, 1895, before a Divisional Court, composed of BOYD, C., and ROBERTSON, J., *Elgin Myers*, Q. C., and *Fish*, supported the motion.

E. F. B. Johnston, Q. C., and *Ross*, contra.

May 27, 1895. BOYD, C. :—

So far as this action rests upon liability to the company through their manager or superintendent Sabiston, I think the point must be considered as settled by the case of *Howells v. Landore, etc., Steel Co.*, L. R. 10 Q. B. 62. That is to say in cases where the action is at common law for negligence and not under the Employers Liability Act, the doctrine of manager or vice-principal, which was put forward in *Murphy v. Smith*, 19 C. B. N. S. 361, is now exploded, and the negligent directions or conduct of a fellow-servant, however much he may be higher in grade or responsibility than the one injured, cannot be reckoned as negligence of the common master.

That branch of this case which rests upon negligence of the company because proper appliances were not furnished for the quarrying operations, does not seem to have been fully tried out or submitted to the jury. The law is, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable apart from the provisions of the Employers Liability Act. See *Smith v. Baker*, A. C. [1891] 325, at p. 339, per Lord Halsbury, C. The employer may be made liable who is blameworthy in respect of not having provided proper machinery and appliances for the work, or as put in

Bartonshill Coal Co. v. Reid, 3 Macq. 266, where a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risks.

Judgment.
Boyd, C.

There is some evidence to shew that the manner of working was to take the tamps out of the charged holes which failed to explode, and that a dangerous tool or one not sufficiently guarded, was in use for this purpose; and that the plant and machinery were bought and furnished by the directors. The manner of working the quarry ought to be known to the governing body of the corporation defendants, and they should be answerable if the system is dangerous or negligently conducted: *Rex v. Medley*, 6 C. & P. 292.

There should be a new trial upon this branch of the case, the costs of which will abide the result. And on the other issues, judgment should be entered for the defendants—though this need not be formally done till after the trial of the other issue.

The costs of these other issues to go to the defendants in any event.

ROBERTSON, J., concurred.

G. F. H.

[CHANCERY DIVISION.]

KELLY v. BARTON.

KELLY v. ARCHIBALD.

Arrest—Notice of Action—Malice—Reasonable and Probable Cause—R. S. O. ch. 73—Municipal Corporation—Liability—Ratification.

The object of the "Act to protect justices of the peace and others from vexatious actions," R. S. O. ch. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof, they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required.

A breach of a city by-law for driving an omnibus without the license required thereby, does not justify the summary arrest of the offender, even though the officer arresting may have believed that he was acting legally and in the discharge of his official duty.

A resolution of the executive committee of a city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts, does not constitute a ratification thereof by the city, so as to make it liable in damages for such acts.

Statement.

THE action *Kelly v. Barton* was tried before FERGUSON, J., and a jury at Toronto, at the Spring Assizes of 1895.

The action was brought by Mary Kelly, the younger against William H. Barton, police sergeant, and the corporation of the city of Toronto.

The statement of claim alleged that on or about the 22nd day of July, A.D. 1894, the defendant William H. Barton unlawfully, maliciously, and without reasonable or probable cause, and without any authority or warrant whatever, did arrest the above named plaintiff in the city of Toronto, and take the said plaintiff still under arrest through several of the public streets in the said city of Toronto to No. 1 police station in said city, to the manifest injury, damage and disgrace of the said plaintiff.

The statement of claim then set out that a notice of this

action was duly served on the defendant William H. Barton, on the first day of October, A.D. 1894, as follows:— Statement.

“We, as solicitors for and on behalf of Mary Kelly the younger, who resides at number two hundred and sixty Logan avenue, in the city of Toronto, hereby give you notice that the said Mary Kelly the younger, after the expiration of one month at least after the service upon you of this notice will cause a writ of summons to be issued out of the High Court of Justice for Ontario in the Chancery Division thereof against you at the suit of the said Mary Kelly the younger, and will proceed therein according to law. For that you did, on the twenty-second day of July, A.D. 1894, in the city of Toronto, unlawfully assault, arrest and imprison the said Mary Kelly the younger, and did cause her to be conveyed to number one police station in the said city of Toronto, to the damage of the said Mary Kelly the younger, of twenty thousand dollars.

Dated this 1st day of October, 1894.

BIGGAR & BURTON,

Solicitors for the said Mary Kelly the younger.

To WILLIAM H. BARTON,

Police Sergeant,

93 D'Arcy street, Toronto.”

which said notice was endorsed as follows:—“This notice is given by Messrs. Biggar & Burton whose place of business is rooms 58 and 59 in the Canada Life Building, 46 King street west in the city of Toronto, as solicitors for Mary Kelly the younger, who resides at No. 260 Logan avenue, in the said city of Toronto.”

The statement of claim also set out that a demand was served on the defendant Barton on the 1st of October, A.D. 1894, in terms as follows:—

“We hereby demand perusal and a copy of the warrant or warrants (if any,) under the authority of which you did on the twenty-second day of July, 1894, in the city of Toronto, arrest and imprison William Kelly, Mary Kelly, Mary Kelly the younger, and Daniel Kelly, and did cause

Statement. them to be conveyed to number one police station in the said city of Toronto.

Dated October 1st, 1894.

BIGGAR & BURTON,
Solicitors for the said William Kelly,
Mary Kelly, Mary Kelly the younger,
and Daniel Kelly, and for each of
them severally.

WILLIAM H. BARTON,
Police Sergeant,
Toronto."

It was then alleged that the said demand had not been complied with; and the defendant Barton had not and never had any warrant or other authority to make the said arrest; that the defendant corporation had adopted and ratified the action of the defendant Barton herein complained of, and they were defending the action and paying the expenses of such defence out of the public funds of the said municipality.

The defendant William H. Barton, pleaded not guilty; and in the margin of the statement of defence referred to the following statute: R. S. O. ch. 73, secs. 1, 2, 13, 14, 15 and 20. A public statute.

The defendants the corporation of the city of Toronto, set up as a defence that the defendant William H. Barton was not engaged by them, and was not their servant or officer, and did not act as such in the matters alleged in the said statement of claim; and the said defendants said that they were not in any way responsible for or chargeable with the acts of the said William H. Barton.

And besides denying the allegations contained in the said statement of claim, submitted that the said statement disclosed no cause of action against them.

In addition to the notice of action set out in the statement of claim, a previous notice of action had been served on the 14th day of August, 1894, which was as follows:—

NOTICE OF ACTION.

Statement.

"We, as solicitors for and on behalf of William Kelly, butcher, who resides at No. 260 Logan avenue, in the city of Toronto, and for Mary Kelly, wife of the said William Kelly, Mary Kelly the younger, daughter of the said William Kelly, and Daniel Kelly, son of the said William Kelly, who all reside with him at the said place, hereby give you notice that the said William Kelly, Mary Kelly, Mary Kelly the younger, and Daniel Kelly, or some or one of them, after the service upon you of this notice, will commence an action or actions against you in the High Court of Justice for Ontario, and will proceed therein according to law. For that you did, on Sunday, the 22nd day of July, 1894, in the city of Toronto, unlawfully, maliciously, and without reasonable or probable cause, arrest and imprison and did convey, or cause to be conveyed to No. 1 police station, in the said city of Toronto, the said William Kelly, Mary Kelly, Mary Kelly the younger, and Daniel Kelly, or some or one of them, to the damage of the said William Kelly of \$10,000, of the said Mary Kelly of \$10,000, of the said Mary Kelly the younger, of \$20,000, and of the said Daniel Kelly of \$10,000, respectively.

BIGGAR & BURTON,

Solicitors for the said William Kelly,
Mary Kelly, Mary Kelly the younger,
and Daniel Kelly.

To WM. H. BARTON,

Police Sergeant,

93 D'Arcy street, Toronto."

The evidence shewed that while the plaintiff with her father, William Kelly, and other members of the family were, as they alleged, proceeding to church in the city of Toronto, in an omnibus driven by one of the father's men, the omnibus was stopped by the defendant at the corner of Yonge and Richmond streets, and the plaintiff was arrested and conveyed to No. 1 police station in the city, when, after the plaintiff had been detained for about a quarter of an hour, she was discharged.

Statement. The evidence relied on against the city of Toronto, was as follows :—

The plaintiff put in evidence the minute book of the executive committee of the corporation from which it appeared that in consequence of a communication from the city solicitor informing the committee that staff inspector Archibald had commenced a prosecution against William Kelly for breach of a by-law of the police commissioners for running an omnibus without the license provided for by the by-law, and asking for instructions, the committee on the 17th July, passed a resolution that Mr. Meredith, the city solicitor, be requested to take charge of and to prosecute in any cases of breaches of the city by-laws, and to defend all city officials in the discharge of their duties. The city solicitor subsequently notified the mayor that a writ had been served on him in this action, and in another one of *Kelly v. Archibald*, and that the instructions given at the meeting held on the 17th July, were not sufficiently specific, and asking for further instructions. The mayor brought the matter before the committee, and at a meeting held on the 6th August, a resolution was passed that the city solicitor be instructed to defend the actions brought against staff inspector Archibald and sergeant Barton for illegal arrest, which was communicated to the city solicitor.

The plaintiff tendered evidence of statements made by the mayor at the meeting of the executive committee in August, of what he had done in the matter.

These were objected to and their admission refused.

The case of *Kelly v. Archibald* was a similar action brought by William Kelly, the father of the plaintiff in the other suit, by reason of his arrest by the defendant Archibald. The notices of action were in the same form as in *Kelly v. Barton*.

The actions were tried together by virtue of a consent order therefor.

At the close of the case the learned Judge was of opinion that there was no evidence to go to the jury, as far as

regards the city ; and he directed nonsuits to be entered as Statement.
against it.

He reserved his decision as to the costs and as to the other defendants ; and on the following morning he delivered judgment as follows :—

KELLY V. ARCHIBALD.—The defendant was a police officer, and a person fulfilling a public duty. It plainly appears by the plaintiff's evidence that the act of the defendant of which the plaintiff complains was a thing done by the defendant in the performance of such public duty, and as I think within the meaning of the provisions respecting such officers or persons contained in the first section of the Act, R. S. O. ch. 73.

The plaintiff has alleged—and it is necessary for him to prove—that the act was done by the defendant maliciously and without reasonable and probable cause. The notice of action given by the plaintiff, the one of the first day of October, 1894, (this being the one now relied on), does not, in stating the cause of action, say that the act of the defendant complained of was done maliciously or without reasonable or probable cause, but only that it was unlawfully done. This does not state the cause of action that the plaintiff must, as I think, allege and prove in order to succeed, and the 14th section of the Act requires that such cause of action shall be clearly and explicitly stated in the notice.

There are many cases shewing that in such circumstances it must be stated in the notice of action that the defendant acted maliciously, etc. If the plaintiff has failed to prove his allegation as to malice and want of reasonable and probable cause, he is liable to be nonsuited or have judgment entered against him under the provisions of the first section of the Act. If the plaintiff should be found or held to have proved this allegation, the cause of action proved by him would not be the one stated in the notice of action, but a different one, and he would be liable to the same result under the provisions of the 20th section of the Act.

I have consulted all the authorities referred to by

Statement. counsel, and some others, and I am firm in the conviction that in order to succeed the plaintiff must prove a cause of action as first above stated, and that the notice of action is insufficient.

I therefore think that the motion for the nonsuit should succeed.

KELLY V. BARTON.—This action is being tried with the other by virtue of a consent order. The position of the plaintiff is not in all respects the same as that of the other plaintiff; he was the owner of the bus. The act complained of in each case, was the same act, an act done by the two defendants, both being police officers, the one being subordinate to the other, the object of the act being to stop the running of the bus, which, for the time being, was done, and the bus taken to the police station, the plaintiff remaining in it; and I am of the opinion that what I have stated in the other case, applies to this case, and with the same result. I think a nonsuit should be entered in each case.

There is judgment already against the plaintiffs, so far as the city is concerned; and after considering the matter as well as I have been able, I do not see any sufficient reason for withholding costs in any event. So these nonsuits will be with costs; and the judgment in favour of the city will also be with costs.

The plaintiffs contended that they relied on the first notice of action as well as the second.

The plaintiffs in each case moved on notice to set aside the nonsuits and to have judgment entered in their favour, or for a new trial.

On the 27th of February, 1895, before a Divisional Court, composed of BOYD, C., and ROBERTSON, J., *McCarthy*, Q. C., and *C. R. W. Biggar*, Q. C., supported the motions, In the first place as regards the defendants Archibald and Barton. The defendants do not deny that there was no authority to arrest the plaintiffs, and that the defendants,

the police officers, were mere trespassers. The action, **Argument.** therefore, can be maintained as an action of trespass without proof of malice and want of reasonable and probable cause : *Connors v. Darling*, 23 U. C. R. 541 ; *Sargeant v. Allen*, 29 U. C. R. 384 ; *Cleland v. Robinson*, 11 C. P. 416 ; *Leary v. Patrick*, 15 Q. B. 266 ; *Caudle v. Seymour*, 1 Q. B. 889, 892 ; *Davis v. Capper*, 10 B. & C. 28. The plaintiffs rely on both notices of action, though the learned Judge seemed to think that the plaintiffs had abandoned the first one ; but on referring to the notes of evidence it will clearly appear that there was no abandonment. All that was said on behalf of the plaintiffs was that if the argument for the plaintiffs was adopted it would not be necessary to rely on the first notice. The case turns on the construction to be placed on the Act R. S. O. ch. 73. Under the first section malice and want of reasonable and probable cause need only be alleged where there is jurisdiction to do the act complained of, *i.e.*, jurisdiction as a police officer, and over the person arrested, to make the arrest. To come within the Act the official must be fulfilling some public duty. Police officers can only be fulfilling a public duty where they have the right to arrest, otherwise it would be necessary to read into the Act, that it is sufficient, if the officers think or suppose they are fulfilling a public duty. The liberty of the subject is not to be at the whim or caprice of a person because he happens to be a police officer. Under sub-sec. 2 of sec. 1, the officer is only entitled to the protection of the Act where he has done something in the execution of his office. The defendants were not entitled to notice at all: *Jones v. Grace*, 17 O. R. 681. But taking it most strongly against the plaintiffs, the officer could only be entitled to notice where he *bonâ fide* believes that a state of facts existed which entitled him to make the arrest. Reading section 14 in this light he may be entitled to a notice of some kind, but the notice need not go further than what is necessary to maintain the action subsequently brought. It is only where malice and want of reasonable and probable cause must be alleged and proved in the action that it need be set out in the notice : *Connolly v. Adams*, 11 U.

Argument. C. R. 327; *Ibbottson v. Henry*, 8 O. R. 625; *Allen v. McQuarrie*, 44 U. C. R. 62; *Griffith v. Taylor*, 2 C. P. D. 194; *McKay v. Cummings*, 6 O. R. 400, 406; *Scott v. Reburn*, 25 O. R. 450; *Sinden v. Brown*, 17 A. R. 173; *Venning v. Steadman*, 9 S. C. R. 206, 211, 212. The second notice given was therefore sufficient. The first notice is also good. The object of the notice is merely to inform the defendant of the action intended to be brought against him so as to enable him to tender amends. The other side contended at the trial that the notice was in the alternative, and that the plaintiffs should have gone through the useless form and expense of giving four separate notices. The case relied on of *Nevill v. Corporation of Ross*, 22 C. P. 487, where a notice which said that the action would be brought in the Queen's Bench or Common Pleas, was held insufficient. This is a very different thing from the notice here which contains all that the statute requires. It says that there may be one or there may be four actions, and if one of the parties brings an action the notice is complied with. The mistake, in any event, is a matter of form, and under the Interpretation Act a mistake of form is not to render any proceeding invalid. If it is essential to prove malice, malice was proved in the manner in which the arrest was made. Then, as regards the defendants, the city of Toronto. No doubt to maintain the action against the city the plaintiffs must shew that the corporation interfered in the arrests, or adopted and ratified the act of the officers in making the arrests. The minutes of the 17th July and 6th August, shew that the police officers were treated as officials of the city in enforcing its by-laws. The evidence of what the mayor reported to the executive committee in his representative character would have shewn that the mayor interfered and authorized the arrests, and on his report the executive committee acted by ratifying and adopting what he had done, as well as the acts of the officers, and instructing their solicitor to defend them. This would render the city liable. It is like the case of the managing

director of a company reporting officially to his board what he had done in any particular matter. The mayor, under section 244 of the Municipal Act, is the chief officer of the corporation, and has the supervision over all the officials. The city can be guilty of a trespass, just as it could be guilty of a libel or of a malicious prosecution. The cases shew that though a corporation is only authorized to do certain acts by its charter, it may be guilty of a wrongful act. The city has an interest in seeing that its by-laws are observed, and can employ agents for the purpose: *Evans on Principal and Agent*, 2nd ed., sec. 189; *Kirkstall Brewery Co. v. Furness R. W. Co.*, L. R. 9 Q. B. 468; *Great Western R. W. Co. v. Willis*, 18 C. B. N. S. 748.

W. R. Riddell, for the defendants Archibald and Barton. There can be no question but that notice of action is necessary under section 14. The question then is, has a proper notice of action been given? The notice of action must shew not only the cause of action, but also the court in which the action is to be brought. Originally the Acts were for the protection of magistrates only: 24 Geo. II. ch. 44; 43 Geo. III. ch. 141. The first Act which was passed extending the protection to constables and entitling them to notice of action was 13 & 14 Vict. ch. 54, which was taken from the Imperial Act 11 & 12 Vict. ch. 44. By sec. 2 of 13 & 14 Vict. ch. 54, all that was required was that the notice should state with reasonable clearness the cause of action, and under this section the argument of the other side might be upheld. By 16 Vict. ch. 180, the section was amended so as to read as it is in the present Act, and instead of requiring merely reasonable certainty, it required that the cause of action should be clearly and specifically stated. The Legislature evidently intended that the exact cause of action should be stated. The object of the notice is not merely to enable the defendants to tender amends: *Jackson v. Kassel*, 26 U. C. R. 341; *Bross v. Huber*, 18 U. C. R. 282. What took place at the trial clearly amounted to an abandonment of the first notice. But assuming that it was not abandoned, still it cannot

Argument.

Argument. avail the plaintiffs. It is in the alternative. The cases shew that an alternative notice is bad: *Bross v. Huber*, 18 U. C. R. 282; *Nevill v. Corporation of Ross*, 22 C. P. 487. It does not say who is going to bring the action. There may be four actions or only one action. The second notice is also bad, by reason of the omission of the allegations of malice and want of reasonable and probable cause. Section 1 is the section which governs the case; section 2 only applies to magistrates. The ordinary trespasser when an action is brought against him has no right to require the plaintiff to prove that the trespass was done maliciously and without reasonable and probable cause. The statute was passed for the express purpose of distinguishing between an ordinary trespasser and an official. The effect of the Act is for the protection of magistrates and officers fulfilling a public duty. If they have acted within their jurisdiction they do not require the protection of the Act at all. It is only when they have acted without jurisdiction that the protection is necessary, therefore the fact of the defendants being trespassers does not deprive them of the protection afforded by the Act. If the officer can shew that he believed that he was doing his duty, then it must be shewn by the plaintiff that he acted maliciously and without reasonable and probable cause. The next point is, were the defendants acting in the supposed discharge of their duty? There can be no question but that the defendants thought they were acting as police officers in enforcing the law, while the plaintiffs all through have treated them as police officers. Thus in *Davis v. Williams*, 13 C. P. 365, where a pound-keeper illegally sold some horses it was held that as it was proved that he believed that he was acting in the discharge of his duty he must be proved to have acted maliciously. See also *McKay v. Cummings*, 6 O. R. 400.

Fullerton, Q. C., for the corporation of the city of Toronto. In order to create ratification by the corporation of the acts of the police officers the acts must have been done in the name of the city and for its benefit: Addison

on Torts, 7th ed., 96; *Nicholl v. Glennie*, 1 M. & S. 588, 592. Argument. The mayor, *qua* mayor, has nothing to do with the police. They are appointed and are under the control of the police commissioners. They are an establishment in themselves, and the city has nothing to do with them. The mayor is a member of the board of police commissioners, but the city cannot control his actions as such. He is entirely independent of the city. The most that can be proven here is that the executive committee have directed its solicitor to defend the actions. The mayor might make himself personally responsible, but not the city. Even if the city council had passed a resolution confirming the action of the police officer, this would not render the city liable: *Russell v. Mayor of New York*, 2 Denio 461, 480; Jones on Negligence of Municipal Corporations, pp. 34, 38; *Buttrick v. City of Lowell*, 1 Allen 172. There are only two cases in which the plaintiff could be interfered with, namely, (1) for a breach of the Lord's Day Act, (2) for running his omnibus without a license contrary to the by-law. In neither case could the mayor interfere as mayor. Nothing, therefore, that the mayor said to the executive committee would be evidence against the city. The direction to the city solicitor would not render the city liable: *Burnes v. Pennell*, 2 H. L. Cas. 497; *Cornwall v. Corporation of West Nissouri*, 25 C. P. 9; *Perley v. Inhabitants of Georgetown*, 7 Gray 464; *Buttrick v. City of Lowell*, 1 Allen 172. The cases relied on by the other side are quite distinguishable. There the principal had authority to do the act, and so he was able to ratify the act of his agent. See also Evans on Principal and Agent, Black ed., sec. 188; *Jordan v. School Section No. 3*, 38 Maine 164, 169; *Board of Trustees of Odell v. Schroeder*, 58 Ill. 353; *Calwell v. City of Boone*, 51 Iowa 687.

. *McCarthy*, Q. C., in reply. The police no doubt are appointed by the police commissioners, and are under their control. The by-law passed as to licenses was only to have force in the city: Consol. Mun. Act, 1892, secs. 434, 436. By section 244 it is the duty of the mayor to see that

Argument. the city by-laws are enforced, and therefore he has jurisdiction to see that the by-law here was enforced. If, therefore, the mayor was acting within his jurisdiction in seeing that the by-law was enforced, his report to the executive committee being in the discharge of his official duty would be evidence to go to the jury. Then as to the other defendants. The plaintiffs are not driven to argue that no notice of action is necessary as notice of action was given here. He referred to Addison on Torts, 7th ed., 780 *et seq.*

May 27th, 1895. BOYD, C.:—

In an action against a justice of the peace the question of notice or no notice of action under 11 & 12 Vict. ch. 44, Imp. St., turns upon his authority to do or to direct the act complained of. Where one had made an order for the medical examination of a woman charged with concealing the birth of her child under which her person was examined, it was held by Lopes, J., that the justice was a trespasser and no notice of action was required. It was admitted that the magistrate had no right to make such an order, but that he acted *bonâ fide* and in the belief that he had authority. But the judgment proceeded on this that there was a total absence of authority to do the act, and his belief availed not as there was nothing on which to ground the belief—no knowledge of any fact whereon such a belief might be based: *Agnew v Jobson*, 47 L. J. M. C. N. S. 67; 42 J. P. 424 (1877). That statute is the same as to justices as our R. S. O. ch. 73; but in Ontario protection is extended to any other officer “fulfilling any public duty for anything by him done in the performance of such public duty.” He is entitled to notice of action, and it must be alleged that the act was done maliciously and without reasonable and probable cause.

One of the cases cited by Mr. Justice Lopes is *Cook v. Leonard*, 6 B. & C. 351, 357, where the statute in question

protected any person "for anything done or performed in execution or under the authority of the Act."

Judgment.

Boyd, C.

Bayley, J., said: "Where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that protection," p. 354; and again he said that such a statute extended "to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the Act," p. 355. That affords a proper test it seems to me to ascertain what cases fall within the protection given by the first section of the Ontario statute, whether as to justices or other officers such as constables.

The great object of the statute is to give protection to all those who are fulfilling a *public duty*, that is who are performing acts which they are *bound* or *required* to perform by reason of their public functions or character: *per* A. Wilson, J., in *Hodgins v. Corporation, etc. of Huron and Bruce*, 3 E. & A. 169, 190. See *Bryson v. Russell*, 14 Q. B. D. 720.

In the present case the officer was not bound or required as a matter of duty to arrest the plaintiff although he was violating the provisions of a city by-law in that he was driving an omnibus without having a license so to do. That conduct was merely the infraction of a police regulation which falls far short of being a crime. There was no state of law or of facts which did exist that could justify this summary arrest though the officer may have *bonâ fide* believed that he had such a legal right, and that such was his official duty.

The first section of our Act seems to me to provide that if the officer in discharge of a public duty acts irregularly or erroneously he is entitled to the qualified protection of the statute; but if he volunteers or assumes to do something which is not imposed upon him as an official duty, then he is outside of this section: see *Rowcliffe v. Murray*, C. & M. 513, 515.

A peace officer is protected in all his round of duty as a *public officer*, but if he acts without authority or juris-

Judgment.

Boyd, C.

diction he is liable as a trespasser. Acting, however, within the bounds of his duty the cause of action rests upon corruptness of motive, and the complainant must prove that the act was malicious: see *per* Erle, J., in *Taylor v. Nesfield*, 3 E. & B. 724.

I have not found anywhere a more lucid exposition of the law of notice as regards constables than is given by Lord Kenyon in *Alcock v. Andrews*, 2 Esp. 542, note. He said the defendant who justified as constable was acting *colore officii* and not *virtute officii*; it had often been held that a constable acting *colore officii* was not protected by the statute (24 Geo. II. ch. 44, sec. 8) where the act committed is of such a nature that the office gives him no authority to do it: in the doing of that act he is not to be considered as an officer: but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such case the statute extends. The distinction is between the extent and the abuse of the authority.

To the same effect is the language of Cockburn, C. J., in *Griffith v. Taylor*, 2 C. P. D. 201, that in order to entitle a party to notice he must have acted under the *bonâ fide* belief in the existence of circumstances which, if they had really existed, would have amounted to a justification (1876): see *Cod v. Cabe*, 45 L. J. N. S. M. C. 101, 102.

My conclusion on this part of the appeal is that the action should not have been stopped because of the want of notice of action imputing malice, and that the cause will have to be remitted for trial as to the two police officers.

So far as the city is concerned, other considerations arise, as to which I now turn. This much evidence affecting the city as defendants was received by the trial Judge without objection: that the mayor called a special meeting of the executive committee of the city council for the 6th August, 1894: that he then stated to that committee that he had given the defendants instructions to stop all 'busses on the following Sunday, and that on

these instructions the plaintiff and his family were arrested, and that he wanted the committee to protect the police by having a lawyer authorized to defend the action ; and that it was then ordered by the executive committee—which has charge of the legal department—that the city solicitor be instructed to defend the present actions on behalf of Archibald and Barton. It is not suggested or pretended that any further evidence in substance could be given of what was said by the mayor in the presence of the executive committee, and I do not think the case should be remitted for further evidence if upon this now given the case was rightly withdrawn from the jury in so far as the city was concerned.

The plaintiffs must rest their claim upon ratification by the city of the alleged illegal act of the police officers, for these latter are not officers or agents of the corporation, but are independently appointed by the board of police commissioners, as an agency of good government, for the benefit of the municipality. Now the only act of ratification is the resolution to defend, and this, in my judgment, falls far short of what would be needed to implicate the city as pecuniarily responsible for the alleged misconduct of the police officers. These officers were acting in assumed vindication of the city by-laws, and it may be under the direction of the mayor who was also one of the board of police commissioners ; but there is nothing to shew any adoption of the act of the officers by the city council, so as to fix the corporation with the consequences of that act. As the mayor directed and the officers acted, the executive committee may have been willing to undertake the expense of litigation (whether legitimately or not is not now under consideration), but something more is needed to shew ratification of the transaction as a whole. Nor should it be left, in my opinion, to the jury in such a case as this to infer from the circumstances such as we find them, whether or not there was an adoption of the whole transaction by the municipal corporation.

In *Perley v. Inhabitants of Georgetown*, 7 Gray 464,

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Boyd, C.

Judgment. it was held that a town does not ratify a collector's illegal acts though it makes payments connected with those illegal acts, because their intervention was doubtless made for a very different purpose than that of ratifying or justifying the acts of the collector. That was followed and applied in *Buttrick v. City of Lowell*, 1 Allen 174, to a case like the present of employing counsel to defend the alleged trespasser.

Boyd, C.

In this case the corporation had no interest in the enforcement of the by-law other than that which was common to the whole community. Their desire in defending cannot be carried higher, upon the evidence before us, than that they desired to encourage officers whose business required them to enforce police regulations. But it by no means follows in the case of governmental bodies such as municipal corporations that the intention was to shoulder all civil liability which might result to the officer from illegal or violent acts: see *Sheldon v. Village of Kalamazoo*, 24 Mich. 384; *Trammel v. Town of Russellville*, 34 Ark. 105; *McKay v. Buffalo*, 9 Hun 407, and *Eastern Counties R. W. Co. v. Broom*, 6 Ex. 314; *Roe v. Birkenhead, etc. R. W. Co.*, 7 Ex. 36.

I agree in the result arrived at by the trial Judge on this branch of the case, that the action fails as to the city, and as to that defendant judgment is affirmed.

The action is dismissed with costs as to the city.

As to the other defendants the judgment of the trial Judge will be set aside with costs to be paid to the plaintiffs or set off, according to the result of subsequent trial upon the final determination of the cases.

ROBERTSON, J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

RE GARBUTT AND ROUNTREE.

Will—Executory Devise—Residuary Devise—Effect of—Vendor and Purchaser.

A testator devised certain land to his son W. during his lifetime ; and in the event of his death, leaving his wife surviving him, he devised the rents, issues and profits to her during her lifetime or widowhood ; but in the event of both dying within thirty years from his death, in such case he devised the rents and profits thereof, until the expiration of such thirty years, to W.'s children equally, share and share alike ; and after W.'s death, and after the death or remarriage of his said wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same after the specified periods to them, their heirs and assigns forever. By the last clause of the will, the testator gave all the residue of his estate, real, personal and mixed, of whatever nature or kind soever, and not otherwise disposed of by his will, to W., to have and to hold the same to him, his heirs and assigns forever.

The testator died on the 9th of January, 1876 ; W. and his wife both survived testator and enjoyed their life estates, and died leaving children still surviving :—

Held, that under the will the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence shewing whether or not W. had disposed of the land, the children could not impart a good title in fee.

THIS was a petition under the provisions of the Vendor and Purchaser Act. The agreement for the purchase and sale of the land was made on the 21st day of February, 1895, between the petitioner Garbutt, the sole surviving executor of the last will of one Joseph Holley, as the vendor, and the respondent Rountree, as the purchaser. Statement.

May 28th, 1895.

W. St. John, for the petitioner.

W. Ross, for the respondent.

June 8th, 1895. FERGUSON, J. :—

As stated at the bar, the petitioner Garbutt has been for many years acting as trustee of the estate of the late Joseph Holley, but is really only an executor appointed by the will. The testator, Joseph Holley, died on the 9th day of January, 1876. As executor, Garbutt had probably

Judgment.
Ferguson, J. no power or control over the lands disposed of by the will. No question is raised as to this, as the purchaser is a willing purchaser, and the vendor proposes to give him a conveyance executed by all the persons who are now beneficially entitled under the devise of these lands contained in the will, and these persons are all of full age and in every respect *sui juris*. They adopt the contract and are willing to join in the conveyance to the purchaser. The question between the parties is as to whether or not these beneficiaries have at present a title in fee to the lands, and can by a conveyance import such title in fee to the purchaser.

The land seems to be about one-fourth of an acre, and is referred to in the agreement as lot number seventy-six in a plan or sub-division of parts of lots number eight and nine in the fifth concession west of Yonge street, of the township of York, made by J. S. Dennis, P. L. S., and dated in December, 1853, but not registered. A description by metes and bounds is also given in the agreement.

The will of the late Joseph Holley disposes of many parcels of land. The parts of it containing the devise of this land are as follows, the immediately preceding devise being to his son William Robert Holley :

"I give and devise to my said son William Robert Holley, all the residue of said lot number eight, in the fifth concession of the said township of York, west of Yonge street, belonging to me and not by me otherwise disposed of, to have and to hold the same unto my said son William Robert Holley for and during the period of his natural life. And in the event of the death of my said son William Robert Holley, leaving his present wife surviving him, in such case I will and bequeath the same rents, issues and profits of said residue of said lot marked eight to his present wife during her lifetime or widowhood. And in the event of both my said son William and his present wife dying within the period of thirty years after my death, in such case I will and bequeath the said rents and profits of said residue of lot

number eight, aforesaid, to all the children of my said son Judgment.
William Robert Holley, by his present wife, equally share Ferguson, J.
and share alike, until the expiration of thirty years after
my death. And after the death of my said son William
Robert, and after the death or remarriage of his present
wife, and provided thirty years have elapsed after my
death, I then give and devise all of the said residue of said
lot number eight, fifth concession, township of York, west,
to all the children of my said son William Robert Holley,
by his present wife, equally share and share alike, to have
and to hold the same after the specified period to them
their heirs and assigns forever."

This residue mentioned in this devise was stated at
the bar and conceded and admitted to be the same land as
lot number seventy-six, mentioned in the agreement for
sale and purchase and therein as aforesaid, described by
metes and bounds.

The will is of very considerable length, and a subsequent
clause near the end of it is as follows :

" In all cases the lawful child or children of any of my
said grandchildren that may have died, to inherit the
deceased parent's share and the share of any of the said
legatees that may have died before getting their share
or portion, as aforesaid, in such case the share or shares of
such dying, if any, shall be equally divided among the sur-
vivors of the family to which such one belongs, the lawful
child or children of any that may have died to inherit the
share of the deceased parent, as aforesaid."

The petition states that there are seven children of
William Robert Holley living, giving their names and
residences, and that one died several years ago, intestate,
unmarried, and without issue, and this statement is not
disputed. Counsel agreed in saying that the death of this
one child is immaterial to the question to be determined.

William Robert Holley died about the 9th day of
August, 1880, having enjoyed his life estate in the land,
His wife living at the date of the will of Joseph Holley,
and at the time of his death when the will took effect,

Judgment. survived her husband William Robert Holley, but died many years ago. These children are the children of Ferguson, J. William Robert Holley and his wife living at the date of the will. As stated at the bar, she had and enjoyed the rents and profits of the land arising after the death of her husband and during her lifetime. Both William Robert Holley and his wife, mentioned in the will, died within the period of thirty years from the death of the testator Joseph Holley. These thirty years will not expire till the year 1906, nearly eleven years hence. It seems plain, that upon the death of their mother, she having survived, their father, these children, grandchildren of the testator Joseph Holley, became entitled to the rents and profits of the land until the expiration of the thirty years from the death of Joseph Holley the testator, and, as was stated, they have been and are enjoying such rents and profits.

Requisitions on title were served and answers thereto were delivered.

The reply to these answers was: "Your answers to the requisitions on title served by me have been duly received. They are satisfactory, except as to number five, on which I have doubts whether the time of sale can be anticipated by the trustees, even with the consent of all the beneficiaries."

A question was raised, but not strenuously urged, as to whether, owing to the peculiar wording of the devise, the gift in fee to the children was not a contingent gift. This gift was, as is readily seen, to take effect after the death of the testator's son, William Robert, and after the death or remarriage of his wife referred to, "and provided the thirty years shall have elapsed after my death." The word "provided" is a word sufficient to express a condition, and the thirty years mentioned had not elapsed at the time of the death of the survivor of the two. The words of this particular gift are, I think, if read by themselves, capable of being so read as to make the gift of the fee a contingent gift, and in such case the contingency would have happened against the gifts. But look-

ing at the whole of the devise of the land in question contained in the will, I think it impossible to arrive at the conclusion that such was at all the intention of the testator, as gathered or to be gathered from the words employed by him, and it is not, as I think, a case in which technical words, sometimes called "fatal words," have been employed, on which the law would inexorably fasten its meaning.

Judgment.

Ferguson, J.

The testator had given to these children the rents and profits of the land from the death of the survivor of their father and mother till the expiration of the thirty years after his own death, and to me it is plain that his intention, gathered from the words he used, was that the title in fee should, in addition, pass to these children at the expiration of the thirty years from his death. The clause in the form of a *habendum* strongly favours this view, and I perceive nothing precluding me from adopting this intention of the testator as the true meaning of the devise.

I am of the opinion that by this devise these children, in the events that have happened, became entitled to the rents and profits of the land from the death of their mother till the expiration of the thirty years from the death of the testator, and at the expiration of the same thirty years to the estate in fee simple in the lands, subject, however, to the operation of the subsequent separate clause to be hereafter referred to, that these are their interests in the lands (assuming, of course, that the testator had a good title in fee).

In the case *Doe d. Goldin v. Lakeman*, 2 B. & Ad. 30, Lord Tenderden, C. J., in delivering the judgment of the Court, said at p. 42: "It is an established rule, that a devise of the rents and profits is a devise of the land." The same rule is given in *Hawkins on Wills* (2nd American ed.), at 119.

This I understand to be the law to be applied so far as necessary to this case, notwithstanding some American authorities to the effect that a devise of rents and profits

Judgment. does not *ex vi termini* pass the land, but only furnishes evidence of an intention that it shall pass, and if upon the face of the will a different intention is manifested that evidence is rebutted. There is, I may say, upon the face of this devise, no different intention manifested so far as I have been able to see.

Ferguson, J.

These children (beneficiaries) then have the land until the expiration of the thirty years from the death of the testator, and at that period they take the fee simple as aforesaid.

The gift in fee simple to these children is an executory devise to take effect at the expiration of the thirty years mentioned in the will, and but for the residuary devise in the will about which nothing was said in the argument the fee simple during this remainder of the thirty years would be in the heirs-at-law of the testator: see Jarman on Wills, 4th ed., p. 865, and the authorities there referred to.

By the last clause of the will, however, the testator gives all the residue of his estate, real, personal and mixed, of whatever nature or kind soever, and not otherwise disposed of by the will, to his said son William Robert Holley, to have and to hold the same to him, his heirs and assigns forever.

This, I apprehend, had the effect of vesting the fee in this land, subject to what may be called the term, in William Robert Holley and his heirs. He died about the year 1880. This fee, subject as aforesaid, should be in his heirs, unless he made a will having the effect of vesting it in some other person or persons or conveyed it away to another, and as to this last I am left in entire ignorance. It may be that this fee simple—subject as aforesaid—descended to these children of William Robert Holley, but I do not know the necessary facts to enable me to say how this may be.

This fee, subject to what has been called a term, does not appear to be in these children, but so far as shewn outstanding, and they are not, for this reason, in a position to impart a good title in fee.

It may here be remarked that if the fee subject to the Judgment. term were in them, these children, there would not be a Ferguson, J. merger of the two fees, for they would not be concurrent but successive estates.

This objection alone would be sufficient ground for deciding against the title proposed to be given the purchaser, he through his counsel claiming to have given him in pursuance of his contract a good and absolute title in fee simple, and this claim being acquiesced in by counsel for the vendors.

There are, however, other and further objections to the title by reason of the substitutional contingent executory devises contained in the paragraph of the will lastly (except the residuary clause) quoted above, which, on the face of the will, stands in the position of what has been frequently called "a separate paragraph or clause."

The contention of the counsel for the vendors was, that inasmuch as the interests of the children are vested interests, they have the power to convey and thereby defeat any such executory gifts. This contention was not, as I think, well founded on principle, and although, as it appears now, those seven children only are entitled, and, reading one part of the clause apart from what precedes and follows it, if one of those were to die, his or her share should be equally divided amongst the members of the family to which he or she belonged; and although a contingent executory or future interest can be conveyed by deed, yet, owing to the manner in which the clause is framed, there is, as I think, sufficient difficulty and uncertainty to cause one to halt before saying the title as so made out is one that a purchaser should be compelled to take. On the whole case I am of that opinion that the vendor's petition fails and that the prayer of the same should not be granted.

If costs are asked, I think the petitioner should pay the purchaser's costs.

G. F. H.

[CHANCERY DIVISION.]

REGINA EX REL. CAVANAGH V. SMITH.

Municipal Corporations—Municipal Debt—Special Rate—Wrongful Diversion of Fund—Disqualification—55 Vict. ch. 42, sec. 373 (O.).

No special appropriation is necessary in order to create a special rate applicable to payment of principal and interest of a municipal debt; if the provisions of the Municipal Act are observed such separate rate, and the sinking fund as part of it, arise as the taxes are collected; and where, no such appropriation having been made, one of the municipal council voted for defraying certain of the current expenses of the municipality out of the amount attributable to that fund, his election as reeve was set aside, and he was declared disqualified from any municipal office for a period of two years pursuant to 55 Vict. ch. 42, sec. 373.

When without any such appropriation so much of the year's income of the municipality has been expended as to leave no more than sufficient to cover such sinking fund, the balance is impressed with that character, and to apply it otherwise is a diversion within the meaning of the above enactment.

Statement. THIS was an appeal from the decision of the Master in Chambers in a *quo warranto* matter, setting aside the election of Robert F. Smith, as reeve of the village of Arthur, upon the grounds and under circumstances set out in the judgments.

The judgment of the Master in Chambers delivered on May 8th, 1895, was as follows:—

Application to set aside the election of Robert F. Smith, the respondent, as reeve of the village of Arthur, on the several grounds mentioned in the notice of motion served herein. The only ground apparently relied upon and argued before me being the one referring to the disqualification of the respondent by reason of his voting in the year 1894, as a councillor of Arthur for the payment of current expenditure with moneys levied and collected for a sinking fund.

The Consolidated Municipal Act, 55 Vict. ch. 42, sec. 373 (3), provides that the members of the council of any municipality who may have voted for the diverting of

any moneys levied and collected for the purpose of a sinking fund shall be disqualified for holding any municipal office for the period of two years.

Judgment.

Master in
Chambers.

Prior to the year 1894, no portion of the moneys levied and collected for the sinking fund appears to have been set apart for that purpose.

On August 20th, 1894, by-law No. 183 was passed providing for the investment of the money at the credit of the sinking fund, and on October 20th following, the sum of \$566.63 was deposited in the Canadian Bank of Commerce at Orangeville, under the provisions of this by-law.

The amount of taxes chargeable for all purposes, including sinking fund, for 1893, was \$5,449.04: see report of Mr. J. B. Laing of January 15th, 1895; and of these taxes Mr. Laing in his report states that only \$4,896.62 were collected, leaving a balance of \$552.42 uncollected at the date of his report.

The amount of taxes chargeable for all purposes, including sinking fund for 1894, was \$5,584.85. The by-law for levying the rate for 1894 was passed on August 30th, 1894, as No. 185.

At the date of the passing of by-law 183, providing for the investment of the money at the credit of the sinking fund, the greater portion of the taxes for 1893 had been collected and received by the treasurer, while no by-law for the taxes for 1894 was passed until August 30th, 1894, or ten days after the passing of by-law 183.

At the time of the passing of by-law 183, there appears from the treasurer's book to have been on hand the sum of \$132.13, being the difference between \$5,469.17 receipts and \$5,337.04 expenditure, applicable for all purposes, including the sinking fund. The amount at that time payable to the sinking fund for 1893, as agreed upon by the council, was \$566.63, so that the council had disbursed out of moneys collected for sinking fund the sum of \$434.50 for current or other expenditure besides sinking fund.

The respondent was a member of the finance committee

Judgment.
Master in
Chambers.

of the council of 1893, and was chairman of that committee for the year 1894. He acted as chairman of the committee of the whole council at the passing of by-law 183. In his examination he states that he was not aware that the money representing this sinking fund had not been invested as provided by the by-law until October 22nd, 1894.

For the respondent it was argued that there were sufficient taxes uncollected for 1893 to provide for this sinking fund, and that there was no time provided for the appropriation of this fund, and until the money was actually appropriated there could be no diverting of it—that the diverting must be wilful before the penalty of disqualification can attach to the member voting.

I have already stated that at the date of the passing of by-law 183, there was only the sum of \$132.13 in the hands of the treasurer of the municipality for all purposes, including the sinking fund, which alone amounted to \$566.63. Yet on August 27th, 1894, or seven days after the passing of this by-law, it appears from the minute book of the council that upon motion of the respondent five accounts amounting to \$11.99 altogether were ordered to be paid, and were subsequently paid.

Sub-section 2 of sec. 373 of the Consolidated Municipal Act, 55 Vict. ch. 42, provides that “any moneys levied and collected for the purpose of a sinking fund shall not in any case be applied towards paying any portion of the current or other expenditures of the municipality save as may be otherwise authorized by this or any other Act.”

It was the duty of the councillors to see that the moneys levied and collected for the sinking fund were kept separate as provided by section 372 of that statute, and they should not have applied it, or any part of it towards paying any portion of the current or other expenditure of the municipality.

It was especially the duty of the chairman of the finance committee to observe the law in this matter, he having the oversight of the finances for the municipality.

In my opinion the respondent in voting for the expenditure of moneys which were evidently levied and collected for sinking fund has rendered himself liable to the penalty of the Act referred to, and his election must be set aside, and he declared disqualified for holding any municipal office for the period of two years.

Judgment.

Master in
Chambers.

As to the costs, in my opinion each party should bear his own. The relator made several charges against the respondent which have been answered satisfactorily. The respondent does not seem to have been guilty of any intentional wrong-doing, and the expenses of the application have been considerably increased by the action of the relator.

As to the objection to the relator on account of his being an alien, I find the evidence insufficient to support the objection answered as it is by the relator's affidavit.

The defendant appealed, and the matter was argued on June 3rd, 1895, before BOYD, C.

Aylesworth, Q. C., and *Wilkins*, for the defendant, referred to Consolidated Municipal Act, 1892, 55 Vict. ch. 42, secs. 372, 373, sub-sec. 3; Harrison's Mun. Man., 5th ed., p. 282; 56 Vict. ch. 35, sec. 9, sub-sec. 5.

C. J. Holman, for the relator, cited Harrison's Mun. Man., 5th ed., p. 61; *Regina v. Baird*, 1 C. L. J. 126.

June 5th, 1895. BOYD, C.:—

In the collection of rates it is provided that besides the ordinary rates there shall be a column for any special rate, the proceeds of which are required by law to be kept distinct and accounted for separately: 55 Vict. ch. 48, sec. 119. Then the collector is to proceed with the collection of all rates on his roll—to return his roll and pay over the proceeds on a day to be fixed, and shall specify in a separate column on his roll how much of the whole amount is paid over on account of each separate rate: *ib.*, sec. 132.

Judgment.

Boyd, C.

Then it is provided in the Municipal Act that the proceeds of special rates applicable to payment of the interest and the principal of every debt shall be kept separate and distinguishable from all other accounts, and that in particular there shall be two separate accounts, one for the special rate and one for the sinking fund (forming part of the special rate): 55 Vict. ch. 42, sec. 372. And it is further provided that any moneys levied and collected for the purpose of a sinking fund shall not be diverted towards paying current expenses, and that members who vote for such diversion shall be disqualified from holding any municipal office for two years: sec. 373. The section contemplates that moneys are levied and collected by the collector and duly paid over to the treasurer, who then transfers the amount collected on special rates to appropriate separate accounts so as to shew the financial aspect of the municipal debt. The moneys thus collected are ear-marked from the outset and reach the hands of the treasurer as a trust fund which is to be kept sacred for the purpose wherefor it was collected. As aptly expressed by my learned predecessor, "it is an incident of the money borrowed (part of the contract of lending): it is due to the creditor that so much shall be set apart yearly towards his eventual payment. Its being done adds to his security; its perversion impairs it. * * Its nature is to create a trust fund, and the municipality is a debtor to the fund year by year as moneys become payable to that fund": *Wilkie v. Corporation of the Village of Clinton*, 18 Gr. 559. Now, if the requirements of the law are observed, it needs, in my opinion, no special appropriation to create the special rate, and as part of it the sinking fund for the municipal year: as the money is collected it arises, and its total is ascertained when the collector returns his roll and makes his special payment to the treasurer. To encroach for general purposes upon the amount attributable to that fund is to commit a breach of trust. The members of the corporation have no difficulty in knowing the state of the fund if the proper accounts are kept; and if they are not kept it is culpable negligence in all concerned.

The evidence in the present case is, that in the year 1893, the by-law 173 for that year authorized the levy of a rate for the sinking fund, and that an amount of \$566.63 was collected on that account. Then in regard to that amount a by-law was passed on August 20th, 1894, by which it was enacted that the surplus moneys, produce of the special rate, and at the credit of the sinking fund account amounting to the sum of \$566.63, be invested, etc. That was moved by the defendant who was the chairman of the finance committee. At that time the whole income for the year had been expended with the exception of some \$132, and apart from this, the treasurer and Council had nothing to represent the amount of the sinking fund for the year 1893. The taxes for the year 1893 were in all \$5,449, of which \$4,896 had been collected, and the whole was treated as a mixed fund, and disbursed without making provision for the \$566 levied for the sinking fund. This deficit as to the sinking fund was made good in September, 1894, out of the general taxes collected for that year, but that would not repair the consequences of any illegal prior draft out of that fund. On August 27th the defendant moved for the payment of some small general accounts out of the balance on hand (\$132), and part of that money was applied accordingly. Such being the state of facts the legal result may be thus summarized: The course of dealing with the year's taxes was, that the whole was handled by the treasurer and council as one fund available for all purposes. The amount collected for the sinking fund was not set apart but was mingled with the rest of the money. Nevertheless its trust character remained so long as there was \$566 in the municipal treasury. When the amount was reduced below that amount then the diversion of the sinking fund moneys began, and it was repeated when the defendant voted for the payment of the general accounts out of the \$132 balance.

This conclusion is reached by the application of the doctrine of *In re Hallett's Estate*, 13 Ch. D. 696, that where trust moneys are mixed at a banker's with other

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moneys, and chequed out by the depositor, the drawer must be taken to have first drawn out his own money in preference to the trust money. Therefore the residue of the year's money (\$132) in this case was impressed with the character of moneys belonging to the sinking fund, and the act of the defendant was *pro tanto* a diversion of this fund in contravention of the statute, sec. 373, sub-sec. 3. The present investigation is not one respecting a matter of criminal import, so that condemnation should be withheld unless a guilty knowledge—the *mens rea*—be established. The object of the legislature is to check careless, unbusiness-like management of the public moneys, and with this view to disqualify members of the council who, with or without design, commit breaches of trust as to this fund. Ignorance that wrong is being done, so far from excusing, is the very thing that the law seeks to mark with disapproval. The erring member, whether he goes astray in the light or in the dark, is no safe councillor, and he is placed under a two years' sentence of exclusion from office in order that correct administration of municipal finance may be for the future, as far as possible, ensured.

Here the defendant could have known, and should have known, all the details of the accounts which I have set forth, and if he diverted the money from its proper channel, it was because he and other members of the council were culpably negligent.

I willingly exculpate the defendant from all moral blame (as the Master has done), but I cannot reverse his judgment of disqualification, though I reach the result by a somewhat different road.

No costs should be given of this appeal; the defendant suffers for his heedlessness; and the applicant has not taken his objection with clearness and precision. The law is a new one also, and it is not unreasonable to withhold costs where the whole controversy has been so confused and involved.

I suppose there will have to be a new election.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. MCBRIDE.

*Criminal Law—Forgery—Evidence—Corroboration—Criminal Code, 1892,
sec. 684.*

Where on a charge of forgery, in addition to evidence of one witness that the forged documents were written by the accused, it was also proved by the same witness that certain names in a book written by the same hand as the forged documents, were in the handwriting of the accused :—

Held, that this was not sufficient corroboration under section 684 of the Criminal Code, 1892.

CASE reserved by the police magistrate of Chatham, Statement.
under section 743 of the Criminal Code, 1892, 55-56 Vict.
ch. 29 (D.).

Two charges of forgery were made against the prisoner, and the only question to be decided is, whether the evidence adduced was, having regard to the provisions of section 684 of the Code, which enacts that no accused person shall be convicted of, amongst other enumerated crimes, forgery “upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused,” sufficient to justify his conviction.

The documents alleged to have been forged were, in the one case, a certificate of the death of George W. Long, for the purpose of supporting a claim against the Metropolitan Insurance Company, payable on proof of the death of Long, which purported to be signed by T. C. Baker, the medical officer of the company ; and in the other case an indorsement purporting to be made by Wilmena Long upon a cheque for \$190, drawn by the company in settlement of the claim and payable to her order.

It was made clear that both of these names had been forged, and it was sought to connect the accused with the forgeries by the evidence of Charles Davis, who testified that both of the names were written by the accused.

There was no corroboration of Davis by evidence implicating the accused, unless, as the police magistrate held, it

Statement. was supplied by proof that certain names written in a book, which were sworn by Davis to be in the handwriting of the accused, were written by the same hand which wrote the signatures in question.

The case was argued before MEREDITH, C. J., and ROSE, J., in the Common Pleas Division on June 1st, 1895.

Lewis, for the prisoner. The Crown cannot succeed on the evidence of one witness: Criminal Code, 1892, 55-56 Vict. ch. 29, sec. 684. If what appears here is sufficient, the statute is avoided: *Regina v. Giles*, 6 C. P. 84. The supposed corroboration is practically the same man's evidence, the evidence of the accomplice: Taylor on the Law of Evidence, 8th ed., at p. 831. As to expert evidence: *Rowley v. London and North-Western R. W. Co.*, L. R. 8 Exch. 221, 228; *Doe dem. Madd v. Suckermore*, 5 A. & E. 703.

Cartwright, Q. C., and *Dymond*, for the Crown, referred to *Regina v. Brierly*, 14 O. R. 525.

June 29th, 1895. MEREDITH, C. J. [After stating the facts as above]:—

I am of opinion that the evidence referred to was not such corroboration as section 684 requires; that the signatures in question, and the names in the book were in the same handwriting, in no way implicated the accused, unless it was shewn that the names in the book were written by the accused, and the only evidence of that was the evidence of Davis.

It is clear, therefore, that Davis was the only witness who implicated the accused, and that there was no such corroboration of his evidence as is required to justify a conviction.

Both of the convictions must, therefore, be quashed.

ROSE, J., concurred.

[COMMON PLEAS DIVISION.]

CRANE V. HUNT AND WAYPER.

Intoxicating Liquors—Injury while Intoxicated—Liquor Supplied by Two Tavern-keepers—Joint Liability—R. S. O. ch. 194, sec. 122.

Where a person comes to his death while intoxicated and the intoxicating liquor has been supplied to him at two taverns and to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. O. ch. 194, sec. 122, they cannot be sued jointly.

The jury having in such an action in which tavern-keepers had been jointly sued assessed the damages at the trial at different sums against the two defendants. Upon application to set aside the verdict on the ground that the statute would not support such a joint action, the plaintiff was put to his election to retain his judgment against either defendant, undertaking to enter a *nolle prosequi* against the other.

MEREDITH, C. J., *hæsitante*.

THIS was an action brought under R. S. O. ch. 194, the Statement.
Liquor License Act, against the keepers of two separate taverns in the village of Hespeler, by the plaintiff as the administrator of one James A. Crane for damages, upon the ground that the said James A. Crane came to his death by drowning while in a state of intoxication, caused by liquors supplied to him by the defendants. The action was tried at Guelph, on April 3rd, 1895, before ROSE, J., and a jury, and resulted in a verdict and judgment against two of the defendants, the action against a third defendant being dismissed, damages in the case of the defendant Hunt being assessed at \$600, and in the case of the defendant Joseph Wayper at \$300.

The defendant Joseph Wayper, moved before the Divisional Court by way of appeal from the verdict and judgment, or for a new trial upon the ground, that the above section created a liability under the circumstances therein set forth, in the keeper of only one inn or tavern, and that the plaintiff could not maintain an action against two or more such keepers jointly; that if Crane came to his death through intoxication as alleged, the evidence shewed that the liquor causing such intoxication, was furnished by Hunt and not by him; and that the liquor furnished by

Statement. him did not contribute to such state of intoxication, and generally that the verdict of the jury against him was contrary to the evidence and the weight of evidence.

The defendant Hunt moved on similar grounds, and alleged that the evidence shewed that the liquor furnished by Wayper produced the intoxication.

All the material facts of the case are mentioned in the judgments.

The motion was argued on May 27th, 1895, before MEREDITH, C. J., and MACMAHON, J.

Haverson, and *G. St. V. Morgan*, for the defendant Hunt. The action could not have been brought at common law. It stands or falls on the statute R. S. O. ch. 194, sec. 122. The action evidently is to be against one hotel-keeper only. At any rate it was not the liquor Hunt gave which caused the accident.

[MEREDITH, C. J.—He got liquor, and the effect of it may have been to continue the intoxication.]

There has been no decision yet as to what is drinking to excess.

Kilmer, for Joseph Wayper. The action is wrongly constituted. There can be no such joint action under the statute.

Wallace Nesbitt, for the plaintiff, shewed cause. We proved that the man was very much intoxicated when he left Hunt. Hunt and Wayper both served the man with liquor to excess. There is a right of action against both.

[MEREDITH, C. J.—To fix Wayper with liability, you must prove that what he gave caused death; that but for what he gave added to what was taken before, death would not have ensued.]

McCurdy v. Swift, 17 C. P. 126, would seem to shew there might be a remedy at common law. In each house there was drinking to excess, from which drinking an accident has resulted, and the jury can assess the damages between the different hotel-keepers.

July 13th, 1895. MEREDITH, C. J. :—

Judgment.

Meredith,
C.J.

These are separate motions by the defendants against the verdict of the jury and the judgment entered upon it.

The action was tried before my learned brother Rose and a jury, at the last Spring Assizes at Guelph. The jury found against both defendants and assessed the damages against the defendant Hunt at \$600, and against the defendant Wayper at \$300, and thereupon judgment was directed to be entered against each defendant for the damages assessed against him with costs of suit. The action failed as against the defendant Joseph Wayper, the elder, and was dismissed as to him, and that judgment is not moved against.

The action is founded on the provisions contained in section 122 of the Liquor License Act, R. S. O. ch. 194, and is brought by the plaintiff as the personal representative of the deceased James A. Crane, whose death is alleged to have happened under such circumstances as according to those provisions rendered the defendants liable to her for the damages sustained in consequence of it.

To maintain the action at all, it was necessary for the plaintiff to establish in evidence that the deceased came to his death (which happened by drowning) while in a state of intoxication from drinking to excess of intoxicating liquor furnished to him in an inn, tavern, or other house or place of public entertainment, wherein refreshments were sold, or in a place where intoxicating liquor of any kind was sold ; and that the defendant sought to be made liable was the keeper of the same.

The jury have found, and there was ample evidence to justify their finding as to each defendant, that the deceased came to his death "by drowning while in a state of intoxication from drinking to excess of intoxicating liquor in the tavern kept by that defendant and furnished to him in such tavern."

Apart from the objection that the findings were not supported by the evidence, it was objected that the action

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Meredith,
C.J.

was practically a separate action against each defendant, and that the two actions could not, according to the practice, be joined together, and that, at all events, there should have been separate trials of them as if they had been separate actions; and it was further objected that the liability created by the statute exists only where the drinking to excess caused the state of intoxication which led to the death, and that the findings were inconsistent, in that they were that the drinking at each tavern though at different hours of the same day and at different places not kept by the same person, caused the state of intoxication in which the deceased was when he came to his death.

I have already said that, in my opinion, the findings of the jury were amply supported by the evidence, and so far, therefore, as the motions are based upon the ground that these findings should be set aside, they fail.

Although at the trial it seems to have been taken for granted that the defendants were only separately liable, I am by no means satisfied that there was not, under the circumstances appearing in this case, a joint liability entitling the plaintiff to proceed against both defendants jointly or against either of them separately.

The objection urged by the defendants as to the inconsistency of the answers of the jury to which I have referred, upon the facts of this case, shews the necessity for construing the section in question, if it be possible to do so, as rendering the defendants jointly liable for the damages to which the plaintiff is entitled.

It is to be borne in mind that in this case the deceased came to his death while in a state of intoxication produced by liquor which he drank to excess at both taverns.

The actionable wrong, I take it, which renders the keeper of the tavern liable, is the causing of the death of the deceased by the means and under the circumstances mentioned in the section, and I do not see why where two tavern-keepers, though at separate times on the same day, supply the liquor to excess and thereby cause the state of intoxication which leads to the loss of the life, they should

not on the ordinary principles applicable to such cases, be liable jointly for the consequences of their act.

Judgment.

Meredith,
C.J.

In the State of Iowa where a somewhat similar law is in force, it has been held that where several persons contribute to a specific intoxication as it is sometimes spoken of, or a single act of intoxication, as the phrase sometimes used is, which causes damage, they are jointly liable for the damages, though the rule is different where the damages are the result of several sales covering a considerable period of time: *Kearney v. Fitzgerald*, 43 Iowa 580; *Huggins v. Kavanagh*, 52 Iowa 368; *Richmond v. Shickler*, 57 Iowa 486.

These decisions were upon the Iowa statute before it was amended as it now is, by providing expressly for a joint and several liability of the persons supplying the liquor in whole or in part.

A similar rule prevails in Ohio: see *Boyd v. Watt*, 27 Ohio 259, where an elaborate discussion as to when a liability as joint tort feorsors under such Acts arises, will be found.

The following passage from Shearman and Redfield on Negligence, is cited (at p. 269) in support of the rule:—

“Persons who co-operate in an act directly causing injury, are jointly liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independently of each other”: (3rd ed., sec. 58).

And the cases of *Colegrove v. The New York and New Haven R. R. Co.*, 20 N. Y. 492, where it was held that if two trains collide by mutual negligence by those operating them, both railway companies are jointly and severally liable, and *Stone v. Dickinson*, 5 Allen 29, where it was said, at p. 31: “It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured,” were referred to.

In the State of Pennsylvania the law appears to be settled in the same way: see *Taylor v. Wright*, 126 Penn. 617.

Judgment.
Meredith,
C.J.

In the State of New York Court of Appeals dealing with the question of joint liability, though not upon a statute like that in question, Mr. Justice Miller delivering the unanimous judgment of the Court, said: "Although they acted independently of each other, they did act at the same time in causing the damage, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all. The water from both sources commingled together, and became one body concentrating at the same locality, soaking through the wall into the plaintiff's premises and injuring the plaintiff's property; and it cannot be said that the water which the defendant's negligence caused to flow on the plaintiff's premises, and which became a portion of all which came there, did not produce the damages complained of. The water with which each of the parties were instrumental in injuring the plaintiff, was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible. The case presented, is not like that where the animals belonging to several owners do damage together, and it is held that each owner is not separately liable for the acts of all, as there is only a separate trespass or wrong against each. No such division can be made of the separate acts in the case at bar, and it bears some analogy to that of *Colegrove v. The New York and New Haven R. W. Co.*, 20 N. Y. 492, where the injury was caused by concurring negligence in the management of the trains of two railroad companies which came in collision, and the defendants were held jointly liable. The collision was but a single act caused by the separate negligence of different parties, which together produced the result": *Slater v. Mersereau*, 64 N. Y. 138, at pp. 146-7.

This case was referred to with approval in the subse-

quent case of *Chipman v. Palmer*, 77 N. Y., at p. 54; and the principle of it applies, I think, to the one under consideration.

Judgment.
Meredith,
C.J.

In *Thorpe v. Brumfitt*, L. R. 8 Ch. at p. 656, Lord Justice James, said: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not shew what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of the obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury."

This dictum was approved of by Mr. Justice Kay, in *Blair v. Deakin*, 57 L. T., at p. 526, and Mr. Justice Chitty, in *Lambton v. Mellish*, [1894] 3 Ch. 163, and he added, at p. 166: "If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole, so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise." See also *Cuddy v. Horn*, 46 Mich. 596; *The Wabash, St. Louis and Pacific R. W. Co. v. Shacklet*, 105 Ill. 364; *Hillman v. Newington*, 57 Cal. 56.

In a recent work on *The Laws Regulating the Manufacture and Sale of Intoxicating Liquors*, by Mr. Black, the question of joint liability is discussed (section 299), and the authorities are collected in a note to the section. The rule is stated in the text in accordance with the views of the Iowa, Ohio, and Pennsylvania Courts, to which I have referred.

I am prepared, therefore, to hold that the defendants in this case, are jointly liable, unless there is something in the section itself which indicates that joint liability is excluded. The language of the section to which my learned

Judgment.
Meredith,
C.J. brother MacMahon refers in the opinion which he has prepared, and I have had an opportunity of perusing, does not lead me to the same conclusion as that to which he has come. It certainly makes it clear that where the liquor is furnished by an agent or employee of the keeper of the tavern, and not by the keeper himself, the person furnishing it, and the keeper, are jointly and severally liable to the action which the section gives, but it does not, I venture to think, make the liability in other cases a different one from what it would have been had the provision just referred to not been enacted.

If the liability be a joint one, as the damages have been separately assessed and at a greater sum against one defendant than against the other, a joint judgment cannot be entered against the two defendants for more than the lesser amount at which they have been assessed against the defendant Wayper, and I would vary the judgment by directing it to be entered against the two defendants for \$300, with full costs of suit, and make no order as to the costs of these motions.

As, however, my brother MacMahon has come to the conclusion that there is no joint liability, and as I agree with his view as to the proper disposition of the case if there be no joint liability, I concur in the making the judgment which he would pronounce the judgment of the Court.

MACMAHON, J. :—

The action is brought under section 122 of R. S. O. ch. 194, the statement of claim alleging, that the defendant Hunt is the keeper of a tavern in the village of Hespeler, called "The Commercial Hotel," and that the Waypers are the owners in the same village, of a tavern called "The Queen's Hotel," at each of which said taverns intoxicating liquors were sold; and that on the 21st day of December, 1894, at the said respective taverns, the said James A. Crane at various times on the said day visited and went to and from

the same, and drank to excess of intoxicating liquor respectively therein, furnished to him by the said defendants ; and that the said James A. Crane, whilst in a state of intoxication from such drinking, came to his death on or about midnight of the said 21st day of December by drowning caused by such intoxication.

Judgment.
MacMahon,
J.

The plaintiff claimed, as administrator of the deceased, to recover from the defendants, jointly and severally, the sum of \$1,000.

At the opening of the case, the learned trial Judge, while not expressing a decided opinion as to the frame of the action, was evidently inclined to think that there could not, under our statute, be a joint action against two inn-keepers, for damages caused by reason of the death of the deceased, when each was acting on his own responsibility in supplying liquor to the deceased ; but he found it difficult on the eve of the trial to compel the plaintiff to elect against which of the inn-keepers he would proceed, and he allowed the action to proceed against the two owners of the taverns.

There was evidence that Crane drank to excess in each of the taverns, and was drunk to stupefaction in each, during the day and night, upon which he met his death.

At the conclusion of the trial, questions were submitted to the jury, which with the answers thereto, are as follows :—

“ 1st. Did James A. Crane come to his death by drowning while in a state of intoxication from drinking to excess of intoxicating liquor, in the tavern kept by the defendant Hunt, and furnished to him in such tavern ?
A. Yes.”

“ 2nd. If you say ‘yes,’ then what damages ought the defendant Hunt to pay ? A. \$600.”

The 3rd and 4th questions were in like form as to Wayper ; the jury answering the 3rd in the affirmative, and assessing the damages under the 4th at \$300.”

Judgment was entered for the defendant Joseph Wayper, the elder, dismissing the action as against him.

Judgment.

MacMahon,
J.

There is a motion by each of the other defendants, to set aside the verdict, and the judgment directed to be entered thereon, upon the ground that section 122 of the Act creates a liability against the keeper of only one tavern, and that the plaintiff cannot maintain an action against two, or more, of such keepers jointly.

R. S. O. ch. 194, sec. 122, provides, "Where in any inn, tavern, * * or place of public entertainment wherein * * intoxicating liquor of any kind is sold, whether legally, or illegally, any person has drunk to excess of intoxicating liquor of any kind, therein furnished to him, and while in a state of intoxication from such drinking has come to his death by suicide, or drowning * * caused by such intoxication, the keeper of such inn, tavern, * * and also any other person or persons, who for him or in his employ, delivered to such person the liquor whereby such intoxication was caused, shall be jointly and severally liable to an action as for personal wrong, (if brought within three months thereafter, but not otherwise), by the legal representatives of the deceased person; and such legal representatives may bring either a joint and several action against them, or a separate action against either or any of them, and by such action or actions, may recover such sum not less than \$100 nor more than \$1,000 in the aggregate, of any such actions, as may therein be assessed by the Court or jury as damages."

The section makes it, I think, clear that the only joint recovery which can be had, is where the intoxicating liquor was delivered to a person (who had come to his death from any of the causes mentioned in the statute), not by the tavern-keeper himself but by someone in his employ, then and in such case the legal representative of the deceased person's estate may bring a joint and several action against the tavern-keeper and the person in his employ who delivered the liquor; but in such action the damages must be assessed against them jointly, which shall not exceed \$1,000: *Mayne on Damages*, 4th ed., p. 536;

Lowfield v. Bancroft, Stra. 910; *Hill v. Goodchild*, 5 Burr. 2790; or he may bring a separate action against any or either of them, but the aggregate of the sums recovered in such actions shall not exceed \$1,000. The legislature evidently intended by the words "any or either of them," to permit separate actions to be brought against each, the aggregate damages of which are not to exceed \$1,000. Without this statutory provision (if I am correct in thus construing the language employed, and there would be no meaning to the words "not more than \$1,000 in the aggregate," unless that was intended), if the tavern-keeper and the person he employs are to be regarded as having committed a joint tort, a judgment against one would of itself without execution be a bar to an action against the other for the same cause: *King v. Hoare*, 13 M. & W., at p. 504; *Brinsmead v. Harrison*, L. R. 7 C. P. 547.

Judgment.

MacMahon,
J.

The section at least clearly shews this: that the limit of recovery by the legal representative for the death of the deceased, is under section 122 the sum of \$1,000, and the action must be against the tavern-keeper who furnished the liquor of which the person drank to excess and so caused the intoxication from which death resulted by drowning.

The defendants, Hunt and Wayper, were not joint tortfeasors. Each furnished the deceased with liquor at their respective taverns on his separate responsibility, and under our statute cannot be made jointly liable in an action.

The law is stated with great accuracy in the Supreme Court of the State of New York, in *Williams v. Sheldon*, 10 Wend. 655, at p. 656: "To entitle a plaintiff to a verdict against all the defendants as joint trespassers, it must appear that they acted in concert in committing the trespass complained of; that if some aided and assisted the others in the trespass, all were equally guilty; or if some employed the others to commit the trespass, or assented to the trespass committed by the others, having an interest therein, they are all jointly guilty; * * it would not be material if they had unequal interests in the avails of

Judgment. the trespass. * * But if any of the defendants are not
MacMahon, guilty at all, or if any of them, though guilty, were acting
J. separately and for themselves alone without any concert
 with the others, they ought to be acquitted, and those only
 found guilty who were acting jointly."

By the Iowa State Code, it is provided that "every wife, child, parent, guardian, employee, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall by selling intoxicating liquors cause the intoxication of such person, for all damages sustained, as well as exemplary damages." In an action brought under this section of the Code by a wife to recover damages sustained by her in consequence of the sale of intoxicating liquors sold to her husband, in which action sixteen persons were made defendants, it was held that a joint action would not lie against several defendants whose places of business were distinct, and who had no business connection with each other, for injuries caused the plaintiff by the sale of intoxicating liquors to her husband. In the judgment, the Court said, at p. 144: "Where two parties each act for himself in producing a result injurious to the plaintiff, they are not jointly liable. A joint liability arises when an immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independent acts of the persons doing them will not create a joint liability, although the wrongs may be committed against the same person." But the Court says: "We are not to be understood as denying a joint liability in cases where the successive sales by several, have produced a particular intoxication from which the injury sued for has resulted": *La France v. Krayner*, 42 Iowa 143.

In Illinois, Indiana and Ohio, the statutes of these States give a right of action to wife, parent, child, etc., who shall be injured in person, property, or means of support by any

intoxicated person, etc., against any person or persons severally or jointly, who by the sale of liquor "have caused the intoxication, in whole or in part, of such person." And under the Illinois statute it was held in an action by a wife for injury caused by the intoxication of her husband, that the party injured may elect to proceed severally or jointly, against the persons who caused the intoxication; but there can be but one satisfaction for the injury. And a recovery and satisfaction by the party injured against one, would constitute an effectual bar to any recovery against another who may have "in part" contributed to cause the intoxication. It was also held that "it availed the defendant nothing to shew that other persons sold liquor to the husband that may have contributed to his intoxication": *Emory v. Addis*, 71, 111, 273. To the like effect is *Fountain v. Draper*, 49 Ind. 441.

Whatever the opinion of the Iowa Court may have been as to imposing a joint liability where several have produced a state of intoxication from which injury has resulted, no such joint liability, as I have already pointed out, exists under our statute. But where two or more inn-keepers have each furnished liquor to excess to a person causing intoxication, and such person is drowned in consequence of his being so intoxicated, if an action is brought against one of the inn-keepers, it should not avail him to set up that another, or others, also furnished the deceased liquor to excess. Otherwise the statute might be rendered nugatory. Take the case of a person going backwards and forwards between two or three taverns, and being furnished with liquor in each to excess, keeping him in a state of intoxication for several hours, and after leaving the last tavern, committing suicide or being drowned. Each may have incurred a liability under the statute, but as there can be a recovery against only one of them, the legal representative of the deceased, if he elects as to the one against whom he will proceed, and satisfies a jury that death was caused by the defendant furnishing liquor to excess to the deceased, then it will not avail the defendant

Judgment.

MacMahon,
J.

Judgment. to shew that another tavern-keeper also furnished the
MacMahon, deceased with liquor to excess which might have conduced
J. to his death.

Where the plaintiff is in doubt as to the person against whom he is entitled to redress, he may, under Rule 308, join two or more defendants to the intent that in such action the question as to which, if any of the defendants is liable, may be determined as to all the parties to the action.

This rule was taken advantage of by the plaintiff in *Harvey v. The Grand Trunk R. W. Co., and Great Western R. W. Co.*, 7 A. R. 715, where the two companies were joined as defendants, because the plaintiff was in doubt as to which company caused the damage to his goods while in transit, and it was held by the Court of Appeal on an appeal by the Great Western Railway Company from an order of Proudfoot, J., refusing to strike out its name as a defendant, that the plaintiff had a right to make both the companies defendants to the action.

The last case I have been able to find under the corresponding English Rule (Order XVI. Rule 7), is *Witted v. Galbraith*, [1893] 1 Q. B. 431, which was an action brought by the widow of a stevedore, under Lord Campbell's Act. The stevedore had been employed in unloading a ship in the docks in London, and while so engaged, had fallen through a hatchway into the hold of the ship, and had suffered such injuries as caused his death. The action was brought against Messrs. Galbraith, Pembroke & Co., the ship brokers who had engaged the stevedore, and against Messrs. Dunlop & Co., the owners of the vessel in question, who resided in Scotland. On an appeal from an order allowing service of the writ on the defendants out of the jurisdiction, Hawkins, J., in delivering the judgment of the Court, said, at p. 434: "It may be a case in which both the defendants cannot be liable, but one or the other clearly must be; and, in such a case, before the facts are known, the plaintiff cannot tell which of two doubtful defendants he ought to sue. He cannot make his final

selection without knowing the facts, and the facts cannot be ascertained until the case is tried." See also *Howell v. West*, W. N. 1879, 90, summarized by Burton, J. A., in *Harvey v. Grand Trunk R. W. Co. and Great Western R. W. Co.*, 7 A. R., at pp. 723-4. Judgment.
MacMahon,
J.

Then there are cases where a passenger on a railway train is injured caused by a collision with the train of another railway, and a doubt may exist as to which of the railways was guilty of the negligence causing the accident. The plaintiff may sue both.

The jury found that James A. Crane came to his death by drowning while in a state of intoxication from drinking to excess of intoxicating liquor furnished to him in the taverns of both Hunt and Wayper. If each had incurred a liability under the statute the plaintiff might have elected to proceed against either, or in this case it being doubtful which he ought to sue he could join both in the action and proceed until the facts were disclosed at the trial.

As it could not be a defence to Wayper that Hunt also supplied liquor to Crane which also contributed to the intoxication conducing to his death, we think the plaintiff is entitled to the election he has made to hold the verdict and judgment directed to be entered thereon against Wayper.

There will be judgment dismissing the motion as against Wayper with costs, including the costs of this motion—on the undertaking of the plaintiff to enter a *nolle prosequi*. as to Hunt.

There will be no costs to Hunt.

A. H. F. L.

[COMMON PLEAS DIVISION.]

REGINA V. PATTERSON.

Criminal Law—Variance between Indictment and Charge—False Pretences
—*Criminal Code, 1892, sec. 641.*

On a charge of stealing 2,200 bushels of beans for which he was committed for trial the evidence before the magistrate disclosed that the prisoner had obtained certain cheques on the false pretence that "there were 2,680 bushels of beans" in his warehouse. At the Assizes he was indicted for obtaining the cheques on the false pretence "that there was then a large quantity of beans, to wit, 2,680 bushels" in his warehouse. During the progress of the trial the indictment was amended by striking out the words "a large quantity of beans, to wit," and the prisoner was convicted thereon :—

Held, no such variation as prevented the indictment being preferred for a charge founded upon the facts or evidence disclosed within the meaning of section 641 of the Criminal Code, 1892 :—

Held, also, that the prisoner not having been misled or prejudiced by the amendment, it was properly made.

Statement.

CASE reserved by Mr. Justice STREET, at the Chatham Assizes.

The prisoner was charged before the police magistrate at Chatham, on February 17th, 1894, with stealing 2,200 bushels of beans, the property of Nathan H. Stevens, and was committed for trial on that charge.

At the Spring Assizes for the county of Kent, held on April 9th, 1895, an indictment was preferred against the prisoner, not for stealing the beans, but for obtaining from the prosecutor by false pretences two cheques, the false pretences alleged being "that there was then a large quantity of beans, to wit, 2,680 bushels of beans, the property of the said Nathan H. Stevens, in the warehouse of the said Archibald Patterson, situated on Erie street, in the village of Ridgetown, and that two car loads of beans that had been sold by said Nathan H. Stevens, were not the property of the said Nathan H. Stevens."

Before the accused was given in charge to the jury, he appealed, under section 641 of the Criminal Code, 1892, to the presiding Judge to quash the indictment, upon the ground that he had not been committed for trial on the charge for which it was preferred, and that it was not for

any charge founded upon the facts or evidence disclosed Statement.
on the depositions taken before the police magistrate, or otherwise authorized in any of the modes by which alone as the section provides, it might have been permitted to be preferred.

The application to quash was refused, and the trial, therefore, proceeded, and during its progress, against the objection of counsel for the accused, the indictment was amended by striking out the words "a large quantity of beans, to wit," and upon the indictment, as so amended, the accused was convicted.

The evidence taken at the preliminary investigation before the police magistrate, formed part of the case, and the questions to be determined were:—

1. Were there facts or evidence disclosed on the depositions taken before the police magistrate upon which the indictment could or ought to have been preferred under section 641 of the Criminal Code, and ought the accused to have been put upon his trial upon the said indictment, or ought the same to have been quashed?

2. Ought the indictment to have been amended and the trial proceeded with, after such amendment, under section 723 of the Criminal Code.

The case was argued before MEREDITH, C. J., and ROSE, J., in the Common Pleas Division, on June 1st, 1895.

Clute, Q. C., for the prisoner. This is the first case under the Act, so far as I can find. What was made the subject of the charge to the grand jury is not to be found anywhere in the depositions: see *Taschereau's Criminal Code*, pp. 739-741. The broad rule is you must prove the indictment as laid: *Roscoe's Criminal Evidence*, 11th ed., at p. 194; *Beale's Cases on Criminal Law*, p. 45; *Archbold Pleading and Evidence*, 20th ed., at p. 230.

[MEREDITH, C. J., cited *Taylor v. The Queen*, [1895] 1 Q. B. 25.]

See also *Taschereau's Criminal Code*, sec. 359, pp. 398-9; *Archbold Pleading and Evidence*, 20th ed., at p. 250.

Argument.

J. R. Cartwright, Q. C., for the Crown. The only question is, would the accused person be misled or prejudiced in his defence if the amendments sought be allowed; was he deprived of any thing of which he has cause to complain? The real question here was as to the false pretence of representing that there was this particular quantity of beans. The amendment here was made so as to conform with the evidence.

June 29th, 1895. MEREDITH, C. J. [After stating the facts as above set out]:—

A perusal of the depositions taken before the police magistrate makes it abundantly clear, that the facts or evidence disclosed on them were sufficient to found a charge of false pretences against the accused. The evidence of the prosecutor Stevens discloses the fact that the cheques which form the subject of the indictment were obtained upon the representation of the accused, that he had, at the time the cheques were got by him, 2,680 bushels of beans in the warehouse of the accused, the property of the prosecutor, and that that representation was untrue, and we think, therefore, that there is no doubt that an indictment might have been preferred against the accused for obtaining the cheques by means of that false pretence, but it was urged by counsel on his behalf that the charge as originally laid in the indictment was a different one from that disclosed in the depositions; that a charge of obtaining the cheques by the false pretence that there was in store a large quantity of beans, to wit, 2,680 bushels of beans, “was a substantially different charge from one where the false pretence was alleged to be that there was (*sic*) in store 2,680 bushels of beans.”

It is, no doubt, true, that upon an indictment charging the false pretence in the former of these terms the words following the words “to wit” were not required to be proved, and that the charge in that case was in substance, that the false pretence was that there was then in store a large quantity of beans.

To give to the enactment in question the meaning contemplated for would, in my opinion, be to place upon its language altogether too narrow and restricted a construction.

Judgment.

Meredith,
C.J.

Before the adoption of the Criminal Code, except in cases to which section 140 of the Criminal Procedure Act applied, there was no such limitation of the right to prefer an indictment as is now contained in section 641 of the Code, but in accordance with the recommendations of the report of the Royal Commissioners on the English Draft Code, 1878, pp. 32, 33, the Parliament of Canada, in codifying the criminal laws of the Dominion, extended the substance of the provisions of section 140 to the case of all indictments.

As pointed out by the Royal Commissioners, their recommendation was based upon what they deemed the manifest injustice of permitting an indictment to be preferred to a grand jury sitting in secret and without any opportunity to the accused of being heard and a bill being found and the accused placed upon trial upon what might turn out to be a wholly unfounded charge, without any preliminary investigation or even notice of the nature of the charge which was intended to be preferred against him.

Section 616 of the Criminal Code provides that no count in an indictment which charges any false pretence shall be deemed insufficient if it does not set out in detail in what the false pretence consisted, and the law had for many years before permitted a charge of false pretences to be laid in that way.

Having regard to that provision and the reasons which led to the enactment and the evident objects of section 641, I am of opinion that inasmuch as the evidence before the police magistrate disclosed a case of false pretences in respect of the 2,680 bushels of beans, the prosecutor was entitled to prefer the indictment which he did prefer, and that the fact that the false pretence was erroneously laid as being that there was in store "a large quantity of beans,

Judgment. to wit, 2,680 bushels of beans," instead of that there were
Meredith, in store "2,680 bushels of beans," did not form a ground
C.J. for quashing the indictment as having been preferred without lawful authority. The accused had notice of the nature of the complaint which the prosecutor made against him and that it in law amounted to a charge of false pretences, and the substance of the charge was that he had obtained the prosecutor's money by falsely representing that he had in store "2,680 bushels of beans." He must be taken, I think, to have known that under the ample powers of amendment which the Courts now possess in criminal matters the charge which was in fact made against him would be investigated, and that any amendment of the record necessary to enable that to be done, could and would be made.

It is clear, it seems to me, that had the indictment charged that the cheques were obtained by false pretences without alleging in what the false pretence consisted, it would have been fully authorized by section 641. Why then should the addition of the words unnecessarily setting out in what the false pretences consisted render the indictment liable to be quashed as having been preferred contrary to the provisions of the section? I am of opinion that it did not and that it is enough that the facts or evidence disclosed on the depositions were sufficient to found a charge of false pretences in respect of the same subject matter which was the foundation of the charge of stealing upon which the accused was committed for trial.

Regina v. Broad, 14 C. P. 168, though the point which arose there was not precisely the same as that with which we have to deal, supports the view which I have endeavoured to express as to the proper construction of such an enactment as that which I am considering. See also section 611 of the Criminal Code.

I am of opinion, therefore, that the first question must be answered in the affirmative.

With regard to the second question, it must be taken that the learned Judge at the trial was of opinion that the

accused was not misled or prejudiced in his defence by the variance between the evidence given and the charge in the indictment, and that question is not now open ; that being so, the learned Judge was, I think, fully warranted in making the amendment which was allowed, and the trial was properly proceeded with after that amendment : Section 723.

Judgment,
Meredith,
C.J.

If it were, however, intended that the case should raise the question whether the accused was misled or prejudiced in his defence by the variance, upon the material before us, I am of opinion, that he was not, and that he ought to have been prepared to meet the charge of false pretences which formed the subject of the inquiry before the police magistrate, and which he had, probably, good reason for thinking, was intended to be covered by the language used in the indictment, the legal effect of which the framer of the indictment may not have fully apprehended when he drew it.

I would answer the second question also in the affirmative.

In the result the conviction is affirmed.

ROSE, J. :—

If the indictment had been framed without setting out in detail in what the false pretence consisted, the objection here urged could not have been raised. Nor do I think it would in anywise have been open, had there been served under such a count particulars in the words appearing in the bill found by the grand jury. Then may not the indictment be treated as one charging a false pretence and giving particulars of such pretence? The Code provides for amending particulars, and if the count here had not set out in detail the false pretence but particulars had been served, then such count being sufficient, an amendment of the particulars under section 723 would not have caused any vice to appear in the proceedings. Equally it seems to me is the amendment of the particulars in the count permissible and unobjectionable.

Judgment.

Rose, J.

The count, as amended, was sustained by evidence both on the preliminary hearing and at the trial, and it would be a misfortune if on an objection purely technical it was necessary to interfere.

I agree that the questions must be answered for the Crown.

A. H. F. L.

[CHANCERY DIVISION.]

UNION SCHOOL SECTION V. LOCKHART.

Public School—Union School Section—Alteration of—Petition of Ratepayers—Award—54 Vict. ch. 55, secs. 87, 96 (O.).

The petition for the formation, alteration, or dissolution of a Union School Section under 54 Vict. ch. 55, sec. 87, sub-sec. 1 (O.), must be, in all cases, the joint petition of five ratepayers from each of the municipalities concerned, otherwise the award based upon it will be void *ab initio*, and section 96 validating defective awards where there has been no notice to quash given within the time prescribed has no application. When the award in such case is that no action be taken, the restriction in sub-section 11 of section 87 against new proceedings for a period of five years does not apply.

Semble, no appeal lies from such an award as last referred to.

In re Union School Section East and West Wawanosh, ante p. 463, not followed.

Statement.

IN this action the plaintiffs attacked the validity of the proceedings by which Union School Section number 16 was formed upon the ground that those proceedings were taken contrary to the provisions of sub-section 11 of section 87 of the Public Schools Act, 1891, 54 Vict. ch. 55 (O.), and were, therefore, nugatory.

Sub-section 11 is as follows:—

“11. No Union School Section shall be allowed or dissolved for a period of five years after the award of the arbitrators has gone into operation, but nothing herein contained shall be construed as restraining any municipal council from enlarging the boundaries of any Union School Section from time to time as may be deemed expedient.”

The effect of the formation of the Union Section in Statement.
question, would be to alter the boundaries of a previously
formed and then existing Union Section.

In the year 1893, petitions were presented by five ratepayers of the several townships in which the then existing Union Section was situate, to the respective councils of those townships—that is to say, five ratepayers of the township of Hullett, presented their petition to the council of that township; five ratepayers of the township of East Wawanosh, their petition to the council of that township; and five ratepayers of the township of West Wawanosh, their petition to the council of that township, praying for the alteration of the section and the formation of a new Union Section.

The council of the township of Hullett refused to appoint an arbitrator to consider the proposed change, and proceedings were thereupon taken in accordance with the provisions of section 87, which resulted in an award being made on August 21st, 1893, by the arbitrators appointed by the county council, by which they determined and awarded that no action should be “taken in the matter of the said petitions,” referring to the petitions presented to the several township councils already mentioned.

The action was tried before MEREDITH, C. J., at Goderich, on May 8th, 1895.

Garrow, Q. C., for the plaintiffs.

E. L. Dickenson, for the defendants.

It was contended by the plaintiffs that the effect of this award was to prevent any other proceeding being taken under section 87 for the alteration or dissolution of the existing Union Section for five years from the publication of the award, and that the proceedings which resulted in the formation of the new Union Section having been taking within that period, they were taken contrary to

Statement. the express prohibition contained in sub-section 11 of section 87, and were, therefore, nugatory.

To this contention, besides disputing the plaintiffs' position as to the effect of sub-section 11, it was answered by the defendants that the proceedings of 1893, including the award, were altogether without jurisdiction and of no effect, because the petitions upon which they were based, were not as the statute requires (sub-section 1 of section 87), "the joint petition of five ratepayers from each of the municipalities concerned, to their respective municipal councils,"—that is to say, five ratepayers from each municipality, did not join in each petition.

The defendants' position as to the award of 1893 was that, even if it had been founded on a proper petition, it did not stand in the way of the subsequent proceedings, as it effected no change in the then existing Union Section and was not, therefore, such an award as sub-section 11 deals with.

July 15th, 1895. MEREDITH, C. J. [after stating the facts as above]:—

The question as to the effect of sub-section 1, which arises here, came before the Chancellor recently in a case of *Trustees of School Section No. 6 York v. Township of York*, March 14th, 1895, not reported,* and he there adopted the view contended for by the defendants as to the nature of the petition requisite to found proceedings for the formation, alteration or dissolution of a Union School Section, and determined that such petitions as were presented in this case did not amount to and were not the joint petition required by sub-section 1.

I think that I ought to follow this decision of the Chancellor, though I confess that it is difficult to arrive at an entirely satisfactory conclusion as to what was really

* The learned Chancellor there said: "I express the opinion that there should be a joint petition signed by ten and presented to each municipality."

intended by sub-section 1, the language of which is by no means clear. Were it not for that decision, one might possibly interpret the words used, so as to make the three petitions together a joint petition, and it may be that what the Legislature meant was that before any such proceedings as the sub-section provides for should be begun, there should be the concurrent action of at least five ratepayers from each of the municipalities, each set of five ratepayers petitioning its own council to appoint an arbitrator. However, as I have said, I think it better that I should follow the Chancellor's decision, and following it, the result is that the plaintiffs' case fails, as the award of 1893 being out of the way, there was nothing to prevent the proceedings which were subsequently taken and which resulted in the formation of the new Union Section being undertaken.

Judgment.

Meredith,
C.J.

It was, however, contended by counsel for the plaintiffs, that the award of 1893 not having been moved against was made unassailable by the provisions of section 96, but I do not think that such an objection as exists in this case is within the validating provisions of that section. The award is declared valid and binding where no notice to set it aside is given within the time mentioned in the section, "notwithstanding any defect in substance or form, or in the manner or time of * * making the same." Here the defect is not in the award or in the manner or time of making it, but there is an entire absence of any authority or jurisdiction to appoint arbitrators, and in such a case it is, I think, plain, that the section has no application. If, however, it has as wide an operation as contended for, I am unable to see why it would not operate to save the award under which the new Union Section was formed from attack, no notice to set it aside having been given.

The contention of the defendants based upon the provisions of section 11, that the award of 1893, if it had been valid, is not such an award as the sub-section points to is, I think, well founded. No change in the section

Judgment.
Meredith,
C.J.

was effected by it, and no provision is made, so far as I can discover in the Act, for an appeal from such an award. By section 88, provision is made for an appeal from an award made by the arbitrators for the formation, alteration or dissolution of a Union School Section, but none for an appeal where the award determines that no change shall be made in the existing state of things. It is difficult to understand why an appeal should be given where action is taken and none where the arbitrators determine that no action shall be taken and the absence of any provision for an appeal in the latter case affords, I think, reason for thinking that no appeal was provided for, because there was to be nothing to prevent a new proceeding being at any time taken by those interested to bring about the desired change which had, for the time being, been denied by the arbitrator.

Full effect can, I think, be given to the language of sub-section 11, by confining the prohibition which it contains to awards forming, altering or dissolving a Union School Section, and the words "after the award of the arbitrators has gone into operation," seem to point to that being what was intended. "Gone into operation," has reference to something that has been done or effected and seems quite inapplicable to the case of an award that "operates" nothing, but determines only that nothing shall be done.

I am aware that this view is opposed to the opinion expressed by the Chancellor in his answer to a question submitted by the Minister of Education, as to the application of sub-section 11 to this case,* but that opinion being given, not in the course of an ordinary litigation between parties, and upon an argument where only counsel for the Minister was heard, I ought not, I think, to follow it, unless it accords with my own opinion, and with great respect, I am unable to agree with it.

The plaintiffs' case, in my opinion, fails, and the action must be dismissed with costs.

* *In re Union School Section East and West Wawanosh*, ante p. 463.

[QUEEN'S BENCH DIVISION.]

HENDRIE V. THE TORONTO, HAMILTON AND BUFFALO
RAILWAY COMPANY.*Railways—Lands Injuriouslly Affected—Right to Compensation.*

The sections of the Dominion Railway Act, 1888, under the 'headings "Plans and Surveys" and "Lands and their Valuations," apply as well to lands "Injuriouslly Affected," as to lands taken for the purposes of the railway. It is no answer to a complaint by a landowner, that the company is proceeding, without having taken the necessary steps under these sections, that he has the authority of the railway committee of the Privy Council for the execution of the works.

Corporation of Parkdale v. West, 12 App. Cas. 602, followed :—

Held, also, that a by-law passed by the Municipal Council for granting aid to the railway, and the validating Act, 58 Vict. ch. 68 (O.), did not affect this question.

THIS was a motion to continue an interim injunction Statement. restraining the defendants, a railway company, incorporated by an Act of the Parliament of Canada, from cutting away or breaking up Hunter street in the city of Hamilton from the easterly side of Charles street to the westerly side of Park street, or in any way interfering with the same in such a manner to interrupt the use and enjoyment thereof as a highway affording access to the plaintiff's premises, and injuriously affecting the said premises, being the north half of the block of land bound by Charles, Hunter, Park and Bold streets of the said city, on which was erected a large brick dwelling house and outbuildings occupied by the plaintiff and his family.

The company, at the time the injunction was granted, were by their contractor, the defendant Onderdonk, about to construct a tunnel through the centre of Hunter street, which would injuriously affect the plaintiff's lands.

No notice was given by the defendants to the plaintiff of the intention to proceed with the said work, or of any application for a warrant of a Judge to authorize the company to proceed therewith, nor had they paid or given security for compensation for the injury to the plaintiff's premises.

Argument.

Bruce, Q. C., for the plaintiffs.

Osler, Q. C., and *Carscallen*, Q. C., for the defendants,
the Railway Company.

Saunders, for the defendant Onderdonk.

June 28, 1895. MEREDITH, C. J.:—

As I intimated at the close of the argument yesterday, the cases of *Corporation of Parkdale v. West*, 12 App. Cas. 602, and *Bowen v. Canada Southern R. W. Co.*, 14 A. R. 1, are, in my opinion, conclusive as to the right of the plaintiffs to compensation for the damage to their property, that will be occasioned by the permanent works on Hunter street, which the defendant railway company intends to construct there, and their contractor, the defendant Onderdonk, was engaged in constructing at the time the injunction, I am asked to continue, was granted by the local Judge at Hamilton.

So far as the present controversy is concerned, *Parkdale v. West*, also decides that the sections of the Dominion Railway Act of 1879, under the headings "Plans and Surveys" and "Lands and their Valuation," which are substantially the same as the corresponding ones in the Act of 1888 (the statute now in force), apply as well to lands injuriously affected,—as it is alleged the plaintiff's lands will be—as to lands actually taken for the purposes of the railway; and that case determines also that the authority of the railway committee of the Privy Council for the execution of the works, is no answer to a complaint by a landowner that the railway company is proceeding with them without having taken the steps necessary according to the provisions of those sections to entitle it to do so.

The defendant company was, therefore, acting without lawful authority in interfering with Hunter street to the injury of the plaintiffs' property without having paid or tendered the compensation to which the plaintiffs were entitled, unless it had procured the authority to do so of a warrant of a Judge under section 163, which it had not done.

It was urged by Mr. Osler that this case was taken out of the authority of the *Parkdale* case by the by-law of the municipal council of Hamilton granting a bonus to the railway company and the validating of that by-law by an Act of the Legislature of Ontario passed at its last session. His argument was that what might, on the authority of that case, have been unlawful until compensation was paid or tendered or authority had been obtained under section 163, was rendered lawful by the passing of the by-law and its validation by the Legislature.

It is impossible to give effect to this contention. It would, in my opinion, require a very clear expression of the intention of the Legislature to do so, to give to its enactments such a construction as would take away from the plaintiffs the rights which they would otherwise have had under the provisions of the Dominion Railway Act, and as would in all probability deprive them of all right to compensation, and full effect can be given to the by-law and the Act of the Legislature without giving to them an effect which would work so manifest an injustice and make the legislation contravene the principle that no one's property shall be taken from him even for the public good without just compensation.

The by-law does not profess to confer any authority upon the railway company to interfere with Hunter street, and the council had no power to give any such authority. What the by-law says as to the works in question, is either merely descriptive of them, or is said for the purpose of making the doing of them a condition precedent to the company's right to receive the bonus, and that, I take it, means doing them under the authority of law and in accordance with the provisions of the statutes applicable to the company's undertaking, and it would be strange indeed that a by-law which evinces on the face of it an evident desire to protect the rights of landowners to compensation, should be held to have the effect of seriously impairing, if not entirely taking away the right to compensation in the case of persons situated and affected as the plaintiffs are.

Judgment.

Meredith,
C.J.

Judgment.
Meredith,
C.J.

It was also urged that I ought not to interfere by granting at this stage of the litigation an injunction, the effect of which would be, it was said, to seriously embarrass the carrying out of an important public work, and perhaps to put a stop to it entirely. But I do not think that any such serious consequences would follow from my taking that course, or that, even if it were so, I ought to permit the defendants, in what appears to me, a disregard of the provisions of the law to do what, upon the material before me, would result in serious and practically irreparable damage to the plaintiffs' property. The defendants have, in my view of the law, no authority for doing what they intend to do, without having first taken the steps or obtained the authority already referred to. I think, however, that having regard to the provisions of section 163, I should not stop the defendants' works if the defendant company will give security for payment of the compensation to which the plaintiffs may be found entitled, to the extent of \$6,000, and will undertake to proceed forthwith under the Act to ascertain the amount of the compensation to be paid. I think, however, that if the defendant company desires it, the plaintiffs must undertake that the defendant company's doing so shall in no way prejudice its right to contest the right of the plaintiff to compensation, and will consent to the costs of the reference being, subject to the provision of the Railway Act, borne by the plaintiffs in the event of its being decided that they are not entitled to compensation, unless at the trial of the action a different order shall be made by the Court as to them. If the defendant company declines to give the security and undertaking, the injunction will be continued till the trial. If the company is willing to give the security and undertaking, and the plaintiffs refuse to give the undertaking and consent on their part which I have mentioned, then the motion to continue the injunction will be refused.

The costs of the motion will be costs in the cause.

I refer also to the case of *Mason v. South Norfolk R. W. Co.*, 19 O. R. 132.

[CHANCERY DIVISION.]

THE TORONTO GENERAL TRUSTS COMPANY

V.

WILSON ET AL.

Will—Construction—Charitable Bequest.

A testator by his will bequeathed to his executors out of his pure personalty the sum of \$10,500, to be paid by them as follows: “\$3,500 to Wycliffe College, \$3,500 to the Bishop of the Diocese of Algoma for the support of missions of the said Diocese, and the balance, to wit, the sum of \$3,500 towards the support of any mission or missions which may be undertaken or established by the Rev. Edward F. Wilson, the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere” :—

Held, (1) that the bequest of the sum for the support of missions to be undertaken was not a bequest to the Rev. Edward F. Wilson personally, but to the executors for the support of the missions.

(2) That it was a good charitable bequest, and referred to missions connected with the spread of religious teaching either in a field or locality of missionary work.

In re Jarman's Estate, Leavers v. Clayton, 8 Ch. D. 584, and *In re Riland's Estate, Phillips v. Robinson*, W. N. 1881, p. 173, distinguished.

THIS was an action brought by the executors of the will of one Henry Covert, against the Reverend Edward F. Wilson and others, beneficiaries thereunder, for the construction of a portion of the will. Statement.

The clause in question was as follows: “I give and bequeath to my executors out of my pure personalty, the sum of \$10,500, to be paid out by my executors as follows: \$3,500 to Wycliffe College; \$3,500 to the Bishop of the Diocese of Algoma, for the support of missions of the said Diocese; and the balance, to wit, the sum of \$3,500 towards the support of any mission or missions which may be undertaken or established by the Reverend Edward F. Wilson, the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere.”

The action was heard on motion for judgment, and was argued on June 12th, 1895, before MEREDITH, C. J.

Argument.

Moss, Q. C., for the plaintiffs. The testator paid the sum of \$1,000, part of the \$3,500, during his lifetime, to Mr. Wilson, who was then superintendent of the Shingwauk Home. He has now left there and gone to British Columbia, where he has a spiritual charge. Should the executors pay him the principal or only the interest to be applied for the benefit of the mission, or should they so apply it themselves? [MEREDITH, C. J.—Does not the payment of the \$1,000 to Mr. Wilson, indicate that the principal should go to him?] Perhaps so, but the language of the will must control, and another question arises: Is the bequest not too vague or uncertain to be carried into effect?

J. F. Dumble, for the defendant Wilson. The bequest is not void for uncertainty. The condition named in the will has been performed. A mission has been “undertaken or established,” within the meaning of the will, and the word “mission,” should bear the same construction here as when used in connection with the similar bequest to the Bishop of Algoma. The advance of \$1,000 to Mr. Wilson by the testator in his lifetime, shews that the testator intended the legacy to be for Mr. Wilson personally. At any rate he is entitled to receive the money as the head of the mission. As the income would be insufficient, the corpus should be available. Costs should be paid out of the estate and not out of the fund: *Attorney-General v. Lawes*, 8 Ha. 32; *Phelps v. Lord*, 25 O. R. 259.

Wm. Davidson, for the infants entitled to the residue. The bequest is void for uncertainty. No time or place is stated when or where the mission is to be established. It is not stated what kind of a mission or the purpose for which the money is to be applied: *Ommanney v. Butcher*, T. & R. 260, at p. 270. The word “mission,” does not indicate any special or definite undertaking, and does not necessarily mean a mission in connection with some religious body. The word is indefinite: *Scott v. Brownrigg*, 9 L. R. Ir. 246. The Court could not enforce the trust if Mr. Wilson did not see fit to establish a mission. There must

be an obligation to apply the fund: *In re Jarman's Estate*, *Argument*. *Leavers v. Clayton*, 8 Ch. D. 584; *Jarman on Wills*, 5th ed., 173; *In re Hewitt's Estate, The Mayor, etc., of Gateshead v. Hudspeth*, 53 L. J. Ch. 132. This is not a bequest to Mr. Wilson personally, and he is not entitled to the fund. The words of the bequest exclude this view, as it is expressed to be "towards the support of any mission or missions which may be established by the Reverend Edward F. Wilson;" and the prior charitable bequests specifically name the objects intended to take the bequest.

Dumble, in reply. If the mission is either undertaken or established, that is sufficient.

July 18th, 1895. MEREDITH, C. J. :—

By his will dated 21st September, 1892, the testator Henry Covert, gave and bequeathed to his executors out of his pure personalty, the sum of \$10,500, to be paid out by them as follows: "\$3,500 to Wycliffe College; \$3,500 to the Bishop of the Diocese of Algoma for the support of missions of the said Diocese, and the balance, to wit, the sum of \$3,500 towards the support of any mission or missions which may be undertaken or established by the Reverend Edward F. Wilson (the defendant Wilson), the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere;" and the residue of the estate is given to the infant defendants.

The question for decision is as to the proper construction of the provision of the will which I have quoted so far as it relates to the "balance of \$3,500," and as to the validity of the bequest of it.

The defendant Wilson was and is a clergyman of the Church of England in Canada, and had been as the will shews in charge of the Shingwauk Home, an institution for the care of Indians, situate in the town of Sault Ste. Marie, in this Province, and he had shortly before the date of the will, announced his intention of separating himself from

Judgment. the management of the Home and proceeding to a new
Meredith, sphere of labour elsewhere, all of which was known to the
C.J. testator, who appears to have taken a warm interest in
the work which Mr. Wilson was carrying on.

It was contended on behalf of the defendant Wilson, that the bequest in question was a bequest to him, and if the correspondence between him and the testator could be looked at for the purpose of arriving at a conclusion as to the proper construction to be placed upon the language of the will, one would probably have little doubt that the intention of the testator was that Mr. Wilson should receive the \$3,500, to be applied and on trust to apply it for the purposes to which it was by the will directed to be devoted.

I cannot, however, for the purpose of construing the will, look at the correspondence, but must determine the question upon the language which the testator has used in the will itself, and so looking at it, it is impossible, I think, to give effect to the contention made on behalf of Mr. Wilson.

Where the testator intended the money which he gives to be paid directly to a person or corporation, he has in the paragraph of the will on which the present controversy has arisen, said so. What he intends for Wyckliffe College is to be paid out by the executors to that corporation; so with regard to the gift for the support of missions in the Diocese of Algoma, the fund bequeathed for that purpose is to be paid out by the executors to the Bishop of that Diocese, who receives it to be applied to those objects; but with regard to the \$3,500 in question, the provision is that the sum is to be paid out, not to Mr. Wilson towards the support of missions undertaken or established by him, but by the executors towards the support of those missions. The name of Mr. Wilson is not used as that of the person to whom the fund is to be entrusted, but as identifying the objects to which the bounty of the testator is to be applied.

The next question is as to whether the bequest is valid.

It was contended by counsel for the defendants, that it is invalid because, as was argued, it is not a gift for charitable purposes, as such purposes are understood in law ; and because of uncertainty or want of definiteness in the description of the objects of the bounty of the testator.

Judgment.
Meredith,
C.J.

In support of the first of these contentions, *Scott v. Brownrigg*, 9 L. R. Ir. 246 (1881), was relied upon as establishing that a bequest for the support of missions is not a good charitable bequest. The purpose for which the fund was in that case to be applied, was such missionary purposes in Ireland as the trustees in their discretion might think fit, and the view of the Master of the Rolls was, that the word "missionary" did not necessarily mean the preaching of the Christian religion ; and that a bequest of that nature, was not a good charitable bequest, and not being so, was too vague and too wide for the Court to carry out the trust, and therefore invalid.

Whether that view be the correct one or not, and I should hesitate long before adopting it ; it is plain, I think, upon the words of this will, that the testator was referring to missions connected with the spread of religious teaching, and used the term missions as referring either to a field or locality of missionary work.

Mr. Wilson was, as I have said, a clergyman of the Church of England, and was engaged in a certain kind of missionary service at the Shingwauk Home, and was about leaving that institution with the intention of engaging in the work of his profession elsewhere ; and besides all this, the testator in the very same paragraph of the will which contains the bequest in question, makes provision for the support of missions in the Diocese of Algoma, entrusting the fund which he provided for that purpose to the Bishop of the Diocese. There can be no doubt as to what the sense is in which he uses the word "missions" as applied to that bequest, and there is no reason why it should have any different meaning attached to it when it is used in regard to the bequest in aid of the other missions, which he was desirous of assisting.

Judgment.

Meredith,
C.J.

The other objection was attempted to be supported on the authority of the cases of *In re Jarman's Estate*, *Leavers v. Clayton*, 8 Ch. D. 584, and *In re Riland's Estate*, *Phillips v. Robinson*, W. N. 1881, p. 173, which establish that where the trustees are authorized to apply a fund to more than one purpose; one of the purposes being charitable and the other not charitable, and not sufficiently designated, as in the first of these cases, to any charitable or benevolent purpose on which the executors might agree; or as in the second case, in aid of the funds of such charitable institutions, or for such charitable or benevolent objects and purposes as they or he might in their or his own discretion think proper, the bequest is invalid.

What vitiated the bequests in those cases, was not that the objects of the testators' bounty were to be selected by the trustees, but they were decided to be invalid because the authority which was given to the trustees empowered them to apply the fund for benevolent purposes, which are not necessarily charitable purposes—using the word “charitable” in its technical sense—and that being so, the rule which applied in other cases, but does not apply to charitable bequests, prevented the bequests on account of the want of definiteness or certainty in the objects of them being given effect to.

That that was the ground of the decision, and that had the provision as to the application of the fund been limited to charitable purposes, the bequest would have been upheld, is shewn by the case of *In re Douglas*, *Obert v. Barrow*, 35 Ch. D. 472. There the fund was, as the Court held the will to mean, to be paid and distributed by the trustees among such charities, charitable societies and charitable institutions, and in such shares and proportions as Lord Shaftesbury should, by writing, nominate. Lord Justice Cotton, at p. 485, referring to *Morice v. The Bishop of Durham*, 10 Ves. 522, said: “All that that case decided was this, that where there is no definite object pointed out as the object of the trust, then the court says that the trust cannot be executed unless the court can itself deter-

mine how it is to be applied, which it can only do where the object is a charity." And the bequest was upheld.

Judgment.
Meredith,
C.J.

In *Ommanney v. Butcher*, T. & R. 260, the Master of the Rolls clearly pointed out this distinction, as will be seen from his observations on pages 271 *et seq.* See also Jarman on Wills, 5th ed., 205, 346.

Had I come to the conclusion that the bequest was not for charitable objects, it would have been though it is not now necessary to consider whether the bequest in question would, in that case, be open to objection on the ground of indefiniteness or uncertainty.

All the objections, therefore, fail, and I hold the bequest to be a valid one.

The executors have, I think, a discretion to apply the corpus of the fund, so far as it may be necessary to resort to it, as well as the income for the support of the missions.

There will be judgment declaring the true construction of the will, so far as it relates to the matters in question, and the rights of the parties in accordance with the opinion I have expressed.

The costs of all parties will be paid out of the residuary estate, and the plaintiffs will be entitled to their costs between solicitor and client. The costs may properly be ordered to be paid out of the residue, the principal contest being as to the validity of the bequest : *Attorney-General v. Lawes*, 8 Ha. 43, *per* Wigram, V.-C.

G. A. B.

[IN THE HIGH COURT OF JUSTICE.]

[IN THE COURT OF OYER AND TERMINER IN AND FOR THE
COUNTY OF ELGIN.]

REGINA

v.

HENDERSHOTT AND WELTER.

*Criminal Law — Coroner's Inquest — Evidence — Subsequent Charge of
Murder — Canada Evidence Act, 1893 — Motive — Prior Attempt to Insure.*

A coroner's court is a criminal court, and the depositions of a witness before such court who is subsequently charged with murder cannot, since the Canada Evidence Act, 1893, be received in evidence against him at the trial, notwithstanding privilege was not claimed by him at the inquest.

On a trial for murder, the alleged motive being the obtaining of insurance moneys on policies effected by the prisoner on the life of the deceased, evidence of a previous attempt by the prisoner to insure another person for his own benefit cannot be given in evidence against him.

Statement. THE prisoners, John A. Hendershott and William D. Welter, were indicted for the murder of one William Hendershott, a nephew of the prisoner Hendershott, the alleged motive being to obtain the amounts of two insurance policies, for \$6,000 and \$5,000 respectively, which had been effected upon the life of the deceased by John A. Hendershott and made payable to himself.

The trial took place at St. Thomas, on March 13, 14, 15, 16, 18, 19, 20, 21, 22 and 23, 1895, before MEREDITH, C.J., and a jury.

Osler, Q.C., D. J. O'Donahue and Kenneth Cameron,
appeared for the Crown.

John A Robinson, for the prisoner Hendershott.

Norman Macdonald, for the prisoner Welter.

During the progress of the trial it was proposed by the Crown counsel to put in the evidence given before the coroner by both the prisoners, who appeared at the inquest and were examined as witnesses, and gave their testimony

in that capacity previous to their being charged with the crime. Argument.

Robinson (with him *Macdonald*). The evidence cannot be used. No such evidence ever could unless it was voluntarily given. Even a confession could not be received unless it was voluntary: and a statement under oath, which is the case here, is not voluntary unless the usual warning is given: Wharton's Criminal Evidence, 9th ed., 666. No warning was given by the coroner to either of the prisoners. Although the Criminal Code provides that magistrates' depositions may be used in certain circumstances, it does not allow such evidence as this. And the Canada Evidence Act, 1893, 56 Vict. ch. 31, sec. 5 (D.) compels any witness to answer, but distinctly protects him from the consequences of such answer. Evidence given as this was is not voluntary. If it were otherwise, then on mere suspicion a coroner's inquest could be commenced and the suspect put in the witness box, and then his evidence could be used against him subsequently. Such a state of the law would be intolerable. The coroner's court is a criminal court, although the coroner has no power to commit now, and the Canada Evidence Act applies. They also referred to *Rex v. Lewis*, 6 C. & P. 161; *Rex v. Davis*, 6 C. & P. at p. 178.

Osler, Q.C. The evidence should be received. This question arose in *Rex v. Mercer*, 2 Starkie 366, and the evidence was received. See also, *Queen v. Coote*, L. R. 4 P. C. 599, and *Regina v. Connolly*, 25 O. R. 151. [MEREDITH, C.J. Those cases seem distinguishable. The witness might have claimed his privilege and refused to answer.] *Osler*, Q.C. He might have claimed his privilege here, but did not. [MEREDITH, C.J. But he has no privilege under section 5 of the Canada Evidence Act of 1893.] *Osler*, Q.C. Has section 5 made any change? The original test is: Has the witness the right to object to answer, and did he do so? If not, the evidence can be used. The coroner's court is a Provincial court. Coroners are Provincial appointments. No one can be tried at a coroner's inquest:

Argument. Code 642. The only Dominion legislation in reference to coroners are sections 568 and 642 of the Code; and they are subject to the Provincial legislature.

Macdonald, in reply. The cases relied on by the counsel for the Crown were all decided before the Canada Evidence Act, 1893. The fact that the Dominion Parliament has legislated in sections 568 and 642 of the Code in reference to coroners, shews they "had jurisdiction in that behalf" under section 2, 56 Vict. ch. 31 (D.).

MEREDITH, C.J. :—

I am going now to dispose of the question of the admissibility of the evidence taken before the coroner, which was tendered on Saturday.

The objection taken by the prisoners is that section 5 of the Act 56 Vict. ch. 31 (D.) prevents these depositions being used as evidence against them. The language of the section is :—"No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person; Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

Had that statute not been passed, I think there is no doubt that the cases referred to by the learned counsel for the Crown are decisive upon the point; that it was the duty of the person examined, if he sought to avail himself of his privilege, to have objected to answer, and if he had not done so, that the depositions might be read in evidence against him. The cases of *Regina v. Coote*, L. R. 4 P. C. 599, and *Regina v. Connolly*, 25 O. R. 151, referred to, seem conclusive upon that point. They proceeded upon the ground that as the law then stood the person who was called as a witness had the right to object to answer any question which

might tend to criminate him, and that if he did not object, he waived that privilege. I think the statute has made an entire change in that respect; and that now no privilege at all exists in a matter to which the statute relates, but that when that privilege has been taken away, the law also has provided that the evidence given shall not be received in evidence against the prisoner in any criminal proceeding.

Judgment.

Meredith,
C.J.

In the case of *The Queen v. Buttle*, reported in L. R. 1 C. C. R. 248, where the prisoner was indicted for perjury committed with respect to an election, the point taken by the learned counsel for the Crown would have been open, but it was not taken, and it seems to have been assumed that a similar statute to this was absolute in preventing the evidence being received against the person who had given it in any criminal proceeding save in excepted cases.

I think the construction which Mr. Osler asked me to put upon the statute requires me to read into it words that are not found there; that substantially I must read it, to give effect to his contention, as if it had said:—"Provided such person claims such privilege." I find no such words in the statute. But, in the Dominion statute, dealing with an analogous subject, (the Controverted Elections Act, R. S. C. ch. 9, sec. 39), the provision is:—"No person shall be excused from answering any question put to him under this Act," similar language to that contained in section 5, "touching or concerning any election, or the conduct of any person thereat, or in relation thereto, on the ground of any privilege, or that the answer to such question will tend to criminate such person; but no answer given by *any person claiming to be excused on the ground of privilege, or that such answer will tend to criminate himself*, shall be used in any criminal proceeding against any such person."

It would appear, therefore, that where the Legislature intended that the person should claim the privilege, it has said so in express words. There is no such limitation in the section in question. I think, therefore, that if the

Judgment. statute applies to the proceedings before the coroner, it
Meredith, prevents the use of the evidence that was taken there as
C.J. evidence against the prisoners.

The only remaining question then is, does it apply to the evidence so taken ?

That depends upon the effect of section 2:—"This Act shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

The only point which I had any doubt upon was as to whether the proceedings before the coroner, no person having then been charged, was a matter within the jurisdiction of the Parliament of Canada, or whether it might not be a matter within the jurisdiction of the Provincial Legislature; and, therefore, not affected by the provisions of the statute. But, upon examination, I find that the coroner's court is a court of record, and it is treated as a criminal court.

It is said in Blackstone, 4th volume, at page 274, that the coroner's court is a court of record, and a criminal court of the realm. In *Regina v. Herford*, 3 E. & E. 115, a very strong court expressed the decided opinion that it was a criminal court, the question there being whether prohibition would lie to the court, it being a criminal court.

It seems to me, therefore, it being a criminal court, and the section requiring the construction which I have put upon it, that it is impossible that these depositions can be read in evidence against the prisoners, and I therefore reject them as evidence.*

At another stage of the case, a witness was asked a question which was objected to, when Mr. Osler for the Crown, stated that he proposed to prove by the witness that at a conversation which took place in June, 1894, between the witness and the prisoners, the latter endeavoured to persuade him to allow them to insure his

* NOTE.—See *Queen v. Madden*, 14 C. L. T. Occ. N. 505.—REP.

life; that the witness said he had no money; that the prisoner Hendershott then said he would pay it if he would make the policy payable to him, and that as the result of the conversation an application was made for life insurance, in which Hendershott and Welter acted together, Welter taking the witness to a doctor's office; and that the Crown proposed to prove that the result was that the application was refused; that notwithstanding that refusal, the witness was taken to a doctor outside the city, to a place where he was less known; and that having been prepared for examination, he was again examined and favourably reported upon; but, as a result, the insurance was refused. The Crown also proposed to shew a promise by Hendershott to give the witness plenty of money for drinking after the insurance was effected, and to shew that there was fraud attempted to be perpetrated upon the insurance company in placing such life insurance; and, that the man in his application was wilfully misdescribed by the prisoner Hendershott.

Argument.

Osler, Q. C., argued that the evidence was admissible on two grounds. First, as shewing a criminal intent in the subsequent act of a kindred nature, namely, the effecting insurances on the life of the deceased, especially having regard to the evidence of the witnesses McConnell and French;* and second, that it was evidence of concert between the prisoners; citing as authorities: *Makin v. The Attorney-General of New South Wales*, [1894] A. C. 57; *The Queen v. Geering*, 18 L. J. N. S., M. C. 215; *Regina v. Dossett*, 2 C. & K. 306; *Regina v. Gray*, 4 F. & F. 1102.

Robinson (with him *Norman Macdonald*), contra,

* The evidence of these witnesses was that the prisoner Hendershott had stated in conversation to the effect that it would be a good thing to insure several people, pay the premiums, and when one of them died to get the money.

And when asked if one didn't die in time before all his money was gone in premiums, he answered, "Get rid of one and that will pay for the rest."

Argument. objected on the ground that the evidence was not relative to the issue, but was collateral matter in no way connected with the case; that the prior attempt to insure shewed no attempt to murder, but at most to defraud; and that it was never consummated. It was not linked with the present case, and shewed no intent in the prisoners' minds; and cited *Regina v. Winslow*, 8 Cox 397; *Regina v. Oddy*, 2 Den. C.C. 264.

MEREDITH, C. J.—I think Mr. Macdonald's objection is well founded. The matter as to which the evidence is proposed to be given is *res inter alios acta*, and therefore inadmissible, unless upon the evidence given by the witnesses McConnell and French, it can be said that it is evidence of an attempt to carry out the plan which, according to that evidence, the prisoner Hendershott then said that he entertained; but, as I am by no means satisfied that it is admissible, even upon that ground, I think I am bound to resolve the doubt in favour of the prisoners and to reject the evidence.

G. A. B.

[QUEEN'S BENCH DIVISION.]

THE QUEEN V. COURSEY.

Prohibition—Public Health—Conviction under By-law in Schedule—Right to Appeal to Quarter Sessions—R. S. O. ch. 205.

Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. ch. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the Quarter Sessions, notwithstanding sec. 112, which has no application.

THIS was a motion to the Judge in Chambers on behalf Statement. of John Coursey and Robert Hill, who had been convicted of having, on June 18th, 1895, suffered and permitted to be deposited on property owned or occupied by Hill, in the township of London, a quantity of night soil, which might endanger the public health, contrary to the by-laws of the township, and had been fined in the sum of twenty dollars each for such offence, for an order prohibiting the convicting justices and the complainant on whose information the conviction was made and one Geffrey, police constable, for the county of Middlesex, from further proceeding by distress, sale or otherwise, towards the enforcement of the said conviction until the appeals of the applicants pursuant to the statute in that behalf from the said conviction to the Court of General Sessions of the Peace for the county of Middlesex should have been heard and disposed of, on the ground that the proceedings sought to be prohibited were beyond the jurisdiction of the convicting justices pending such appeal.

The affidavit filed on the application shewed that the necessary notice of appeal to the Court of General Sessions had been given and the proper recognizance entered into according to the provisions of the statute in that behalf; that since the giving of the said notice and the entering into of the said recognizance, the convicting justices had issued a distress warrant directed to the said Geffrey to levy on the goods of the applicants the above fines with

Statement. costs ; and that the said Geffrey had seized, under the said warrant, certain goods of the applicants ; and that the convicting justices contended as the applicants were advised that there was no right of appeal against their conviction, which the applicants maintained they had.

The motion was argued upon August 28th, 1895, before
ROSE, J.

Shepley, Q. C., for the motion.

Aylesworth, Q. C., contra.

September 3rd, 1895. ROSE, J. :—

I am of the opinion that the right of appeal in this case has not been taken away by R. S. O. ch. 205, sec. 112, the conviction not being under that Act, but under section 4 of the by-law, Schedule A to the Act.

Section 113 declares that the enactments contained in Schedule A “shall be in force in every municipality in this Province * * as a by-law of such municipality.” The caption of the schedule is “By-law in force in every municipality, till altered by the municipal council,” and section 113 gives power to alter, amend or repeal the enactments in Schedule A and to pass by-laws, from time to time, in respect of the various matters dealt with by the said enactments.

Sub-section 4 of section 106 recognizes the distinction between a conviction for “an offence under this Act,” and “under any regulation or by-law enacted or in force thereunder,” as also does section 111, which provides that “Where any act or omission is a violation of any express provision of this Act and is also a violation of a by-law of a municipality in respect of a matter over which the council of the municipality has jurisdiction, a conviction may be had under either the Act or the by-law, but a second conviction shall not be made for the same act or omission.”

Then comes section 112, which is as follows: “No order

or other proceeding, matter or thing done or transacted in or relating to the execution of this Act shall be vacated, quashed or set aside for want of form or be removed or removable by *certiorari* or other writ or process whatsoever into the High Court, and no appeal shall be had to the General Sessions upon any conviction under this Act.”

Judgment.

Rose, J.

There are express prohibitions in sections 87, 88, 89, 92 and 93 of the Act, apart from any other sections, for which a penalty is provided by section 106, and a conviction for any violation of such prohibitions would be a conviction under the Act within the meaning of section 112.

Express words would be required to take away the right of appeal, and I do not find such words in section 112 with relation to a conviction under the by-law. I think it makes no difference that the by-law is one found in Schedule A, and not one passed by the council, otherwise as pointed out by Mr. Shepley, there would be an appeal where a municipality had passed a by-law similar to the one set out in Schedule A, and no appeal where a municipality chose to act under the by-law, enacted as by section 113. Apart, however, from any such consideration, it seems to me a clear distinction is drawn in the Act between an offence under the Act and an offence under a by-law, and that the right of appeal is taken away in the former case only.

It was said that the learned Judge of the County Court of the county of York had expressed a different opinion in the case of *Regina v. Redmond*, afterwards reported in 24 O. R. 331, on a motion to quash. If, as a matter of fact, that learned Judge so expressly held, his opinion is, of course, entitled to very great respect, and I have, therefore, been the more careful to examine closely the reasons which compel me to take another view. It may be, however, that an examination of his opinion, which is not before me, would shew other considerations not appearing in this case, which would make good grounds for the difference in opinion.

Then does prohibition lie? Clearly so, I think. It makes no difference that this is a criminal matter: *The Queen*

Judgment.
Rose, J.

v. *Herford*, 3 E. & E. 115 ; nor that the warrant has been issued : *Johnson v. Therrien*, 12 P. R., at p. 445 ; Lloyd on Prohibition, p. 67. And it may go as well to the bailiff as to the Judge, as appears from the same authorities.

See also Bacon's Abr. Title Prohibition ; Com. Dig. Prohibition ; Shortt on Informations, etc., Blackstone series, p. [*436] ; High's Extraordinary Legal Remedies, 2nd ed., sec. 762, *et seq.*, and especially sec. 789. See also the form of warrant, Schedule D. D. D., to the Criminal Code, ch. 29, 55-56 Vict. (D.), as to when the justices cease to have any duty to perform respecting the distress.

Mr. Aylesworth urged as a difficulty that a prohibition might prevent the justices from issuing or having enforced a warrant in the event of its being held that for any reason an appeal would not lie or that the appeal should be dismissed. But apart from any provision enabling the sessions to order the issue of a warrant, there is power to prohibit until after the hearing of the appeal or of any motion to quash the same : Shortt on Informations, etc., Blackstone series [*453], where it is said, " A prohibition may be absolute or until some act be done."

A question was suggested as to the sessions being bound by the judgment of the learned Judge of the County Court of York as the decision of a Court of co-ordinate jurisdiction under the recent legislation, see section 9 of the Law Court's Act, 1895, 58 Vict. ch. 13 (O.), but a reference to that section will shew that the provisions are confined to decisions of a Divisional Court of the Court of Appeal and of the High Court.

It was not contended that if there was a right of appeal, this was not a case in which the justices had jurisdiction to issue a distress warrant.

Following the decision in *Johnson v. Therrien*, the writ may issue according to the authority cited from Fitzherbert.

I shall at present make no order as to costs. If the parties desire, they may be spoken to after the disposition of the appeal to the sessions.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF MORRIS

V.

THE CORPORATION OF THE COUNTY OF HURON.

*Statutes—Repeal of an Act—Exception—Interpretation Act—Effect of—
Con. Mun. Act, 1892, 55 Vict. ch. 42, sec. 533a (O.)—57 Vict. ch. 50,
sec. 14 (O.).*

The saving provisions of sec. 14 of The Municipal Amendment Act, 1894, 57 Vic. ch. 50 (O.), do not operate so as by implication necessarily to exclude the application of the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 43, and

A township corporation which had obtained an award against a county corporation under sec. 533a of the Consolidated Municipal Act, 1892, for part of the cost of the maintenance of certain bridges were, notwithstanding the repeal of sec. 533a by sec. 14 of 57 Vict. ch. 50 (O.), held entitled to recover the amount expended on the same up to the date of the passing of the latter Act.

THIS was an action to recover a portion of the cost of the maintenance of certain bridges, under the circumstances set out in the judgment, which was tried at Goderich on May 8th, 1895, before MEREDITH, C. J., without a jury. Statement.

E. L. Dickenson, for the plaintiffs. The plaintiffs are entitled to the benefit of their award, which has the force of a judgment. It could have been sued upon at once and turned into a judgment; as the money was paid a right of action at once arose. Unless it falls under the repealing clause it cannot fall under the saving clause 57 Vict. ch. 50, sec. 14 (O.) That section does not apply to it: R. S. O. ch. 1, sec. 8, sub-sec. 43. Even if that sub-section was not in force, the plaintiffs' right could not be taken away without express words: Sedgwick on the Interpretation and Construction of Statutory and Constitutional Law, 164-167, 206-208.

Garrow, Q. C., for the defendants. When the statute was repealed the result was the same as if it had never existed: *Kay v. Goodwin*, 6 Bing., at pp. 582, 583; *Re The Mexican and South American Co.*, 4 D. & J., at p. 557; *Surtees v.*

Argument. *Ellison*, 9 B. & C., at p. 752. The maxim *expressio unius est exclusio alterius*, applies : *The Warden, etc., of St. Paul's v. The Bishop of Lincoln*, 4 Price 65. Applying this maxim, the reservation of the costs shews that even a vested right coupled with proceedings, was not to be exempt, and the exception of agreements shews that a right even determined by a judgment or award, was not to be excepted. The repealing section should receive a liberal interpretation : R. S. O. ch. 1, sec. 8, sub-sec. 39. There is no vested right here, but merely a re-arrangement of taxation : *Smith v. Packard*, 12 Wis. 371 ; *People v. Livingston*, 6 Wend. (N. Y.) 526 ; *Hagerstown v. Sehner*, 37 Md. 180 ; *Moers v. The City of Reading*, 21 Pa. St. R. 188. Upon the question of the effect upon pending proceedings of the repeal of the statute upon which such proceedings are founded, I refer to *The Queen v. The Inhabitants of Mawgan in Meneage*, 8 A. & E. 496 ; *The Queen v. The Inhabitants of Denton*, 18 Q. B. 761 ; *Simpson v. Ready*, 11 M. & W. 344 ; *Morgan v. Thorne*, 7 M. & W. 400 ; *Charrington v. Meatheringham*, 2 M. & W. 142 & 288 ; *London Association of Shipowners and Brokers v. London and India Docks Joint Committee*, [1892] 3 Ch. 251 ; *Moon v. Durden*, 2 Exch. 22 ; *McEvoy v. Clune*, 21 Gr. 515 ; *Walker v. Walton*, 1 A. R. 579 ; *The Queen v. Vine*, L. R. 10 Q. B. 195 ; *Heydon's Case*, 2 Rep. p. 18 ; *Cornill v. Hudson*, 8 E. & B. 429 ; *Pardo v. Bingham*, L. R. 4 Ch. 735.

Dickenson, in reply, referred to *Green v. Wood*, 7 Q. B. 178.

July 16th, 1895. MEREDITH, C. J. :—

The action is brought to recover from the defendants forty per cent. of the amount expended by the plaintiffs in the maintenance of certain of their bridges, and is founded on an award dated the 29th of April, 1893, made under the provisions of section 533a of the Consolidated Municipal Act, 1892, awarding and directing that the defendants should pay to the plaintiffs forty (40) per cent. of the

cost of the maintenance during the period of ten (10) years, commencing with and including the year 1893, to be paid from time to time as the work and materials should be done and provided, of certain bridges in the township of Morris, including the bridges in respect of which the claim is now made.

Judgment.
Meredith,
C.J.

By sub-section 3 of the section, it is provided that "the county council shall pay to such local municipality" (*i. e.*, the municipality which is by agreement or an award entitled to contribution from the county), "any sum or sums settled by agreement or fixed by arbitration for the purposes aforesaid, in such manner and at such times as may be provided by the agreement or directed by the award.

But for the repeal of section 533a by 57 Vict. ch. 50, sec. 14 (O.), the plaintiffs' right to recover is conceded. It is, however, contended by the defendants that the effect of the repeal is to take away the right of action which was vested in the plaintiffs at the time the repealing Act went into operation, for the recovery of the moneys before then expended by them, and to put an end to all further or future liability under the award.

The words of the repealing Act are: "Section 533a of the said Act is repealed; but such repeal shall not affect the costs heretofore incurred in any arbitration, action, suit or proceeding now pending; but the question of costs may be adjudicated upon and determined as if this Act had not been passed; nor shall such repeal affect any contract or agreement heretofore made or entered into between any county, and one or more of the minor municipalities thereof relating to the construction or maintenance of any particular bridge or bridges, but such contract or agreement shall remain as though this Act had not been passed."

I agree with Mr. Garrow that if the plaintiffs' rights are not saved from the effect of the repeal of the Act by which they were created, unless the right of action arising or accrued, or in respect of them has passed into a judgment, which is not the case here, they are gone. That un-

Judgment. undoubtedly is the effect of a simple repeal of an Act such
Meredith, as section 533a is. The repealed Act becomes, except
C.J. as to past transactions, as if it never had existed; but it
is contended that sub-section 43 of section 8 of the Interpretation Act (R. S. O. ch. 1), applies, and saves the plaintiffs' rights from the effect of the repeal.

Sub-section 43 is as follows: "The repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause, before the time when such repeal shall take effect; but the proceedings in such case shall be conformable when necessary to the repealing Act."

This sub-section, unless its application to the repealing Act is excluded by the provisions which are contained in that Act, undoubtedly saves the plaintiffs' right of action as to moneys expended by them before the repealing Act went into operation. There was a right of action clearly vested in the plaintiffs existing at the time of the repeal, and the repeal is not to affect such a right.

Then is the language of the repealing Act such as to exclude the application of the provisions of the Interpretation Act, which by section 7 are to apply, except in so far as they are "inconsistent with the intent and object" of the Act or the interpretation which they "would give to any word, expression, or clause, is inconsistent with the context."

A construction ought not, I think, to be placed on the section which would work such a manifest injustice as is involved in taking away the plaintiffs' right of action for moneys actually expended, and which ought to have been repaid to them by the defendants long before the repealing Act became law, unless it be clear from the language which the Legislature has used, that such was its intent and object.

Whatever may have been the cases intended to be provided for by the saving words of the repealing Act, I do not think that the use of those words is inconsistent with

the intention of the Legislature having been to leave municipalities situated as the plaintiffs were in possession of their right to recover moneys previously expended, and that full effect may be given to them, by leaving the repeal to operate so as to relieve the counties from the liability to contribute to expenditures incurred after the repealing Act came into force, except in those cases in which the county authorities had chosen to bind themselves by an agreement as to any particular bridge or bridges, in which case the county was to remain under the liability created by such agreement, and as providing that where proceedings had been begun under section 533*a*, and had not resulted in an award, or litigation had arisen as to the award, the costs might, nevertheless, be adjudicated on; but whatever may have been the object in view or the cases to which the saving provisions were intended to apply, I am prepared to hold that they do not operate so as by implication necessarily to exclude the application of the Interpretation Act, and to relieve a county from a liability to contribute towards expenditures, incurred before the repealing Act went into effect, and in respect of which the township had then a vested right of action, though they do, in my opinion, prevent the plaintiffs recovering in respect of moneys expended by them afterwards.

The plaintiffs are entitled to judgment against the defendants for forty per cent. of the expenditures, made by them, for the maintenance of the bridges mentioned in the award, before the 1st September, 1894, the day on which the repealing Act took effect; and if the parties cannot agree as to the amount properly payable on that footing, there must be a reference for the purpose of ascertaining it. The plaintiffs are also entitled to their costs of the action, and there will be judgment accordingly.

G. A. B.

Judgment.

Meredith,
C.J.

[COMMON PLEAS DIVISION.]

BROUGHTON V. THE MUNICIPAL CORPORATION OF THE
TOWNSHIP OF GREY ET AL.

Municipal Corporations—Drainage By-law—Obligations of Initiating and Contributory Townships respectively—Consolidated Municipal Act, 1892—55 Vict. ch. 42, secs. 569, 579, 580, and 585 (O.)

Where a township municipality passed a by-law, purporting to be under sec. 585 of the Consolidated Municipal Act, 1892, for the purpose of making certain alterations and improvements in a drain, and served an adjoining municipality, which was to be benefited by the work, with a copy of the engineer's report, etc., shewing the sum required to be contributed by the latter, as directed by sec. 579, and the by-law of the initiating township was irregular and invalid :—

Held, per MEREDITH, C. J., the contributory township was nevertheless not only entitled, but bound, within the four months prescribed by sec. 580, to pass the necessary by-law to raise their share of the estimated cost :—

Held, per ROSE, J., the contributory township could not be required to pass a by-law raising its share until the initiating municipality had passed a valid by-law adopting the report providing for the doing of the work, including, provisionally, measures for the raising of its proportion of the funds :—

Held, per MACMAHON, J., the contributory township had no power to pass a by-law for raising its share of the proposed expenditure until the initiating municipality had passed its by-law for the construction of the works :—

Held, however, MACMAHON, J., hæsitante, that in this case the portion of the by-law of the initiating township providing for the construction of the work was a sufficient compliance with sec. 569, and severable from the other portion of it, providing for the raising of the funds.

Where the council for one municipality assumed under the supposed authority of 55 Vict. ch. 42, sec. 585 (O.), in a by-law for the improvement of a drain, to assess lands of the plaintiff situated in another municipality :—

Held, that such assessment was wholly nugatory and void and the plaintiff could not be bound by it, and was therefore not entitled to a declaration declaring it illegal and invalid.

Statement.

THIS was an action brought by Albert Broughton against the municipal corporation of the township of Grey and the municipal corporation of the township of Elma, claiming, under the circumstances, which are fully set out in the judgments, a declaration that a certain by-law of the township of Grey to provide a proper outlet for and otherwise for the improvement and extension of government drain No. 2 in the said township, and for borrowing on the credit of the municipality the sum of \$16,210.33

for completing the same, was of no force or effect as against him, or that it was as against him illegal and invalid, and that if necessary the same should be set aside and rescinded, or in any event the portion of it which affected him and his lands; and that the defendants, the township of Elma, should be perpetually restrained from passing, or attempting to pass, a certain proposed by-law to raise and pay over to the treasurer of the township of Grey the sum of \$4,617.36, being the amount assessed in the report of the engineer for the township of Grey, set out in the said by-law of the township of Grey, against lands and roads in the township of Elma as to be benefited by the proposed work, and from taking any further steps towards furthering as against him, the plaintiff, the said illegal proceedings of the township of Grey. Statement.

The case was argued, as on a stated case and motion for judgment, on February 6th, 1895, before FALCONBRIDGE, J., who dismissed the action without costs to either party.

The plaintiff on May 31st, 1895, moved before the Divisional Court, consisting of MEREDITH, C.J., and ROSE, and MACMAHON, JJ., by way of appeal from this decision.

J. P. Mabee, for the plaintiff. Supposing the township of Grey got their engineer to make the survey, plans, etc., and served the township of Elma, but passed no by-law, and, after four months, applied for a mandamus against the township of Elma, surely they must fail. The initiatory steps must be legal or we are not bound to raise our proportion: *Township of Stephen v. Township of McGillivray*, 18 A. R. 516. The plaintiff has a right to attack this by-law: 55 Vict. ch. 42, sec. 332 (O.).

[ROSE, J.—They have raised too much money in their own township. You are not a ratepayer of the township.]

If we had known within the time allowed, 55 Vict. ch. 42, sec. 334, that the by-law had been passed, to lay a foundation for making Elma pass a by-law that affected our lands, we could have moved, under section 352. We

Argument. are entitled to prevent Elma passing a by-law affecting our lands and imposing this tax upon us. One has a year to move in when the notice, as here, is not in accordance with the statute: *In re Ferguson and The Corporation of the Township of Howick*, 44 U. C. R. 41. The notice was not served here on the reeve and the clerk, but only on the latter.

[ROSE, J.—Where it is registered 55 Vict. ch. 42, sec. 571, applies, and *Ferguson v. The Corporation of the Township of Howick*, does not apply.]

I admit that if the registration cures the defects the action is not well founded so far as the township of Grey is concerned. But we may be entitled to have the township of Elma restrained from passing its by-law, even if the action as against the township of Grey is ill-founded.

[MEREDITH, C.J.—All we are concerned with on your pleadings is whether the township of Grey has passed an effective by-law to compel the township of Elma to pass a by-law.]

I refer to the judgment of MacMahon, J., in *Walker v. Townships of Ellice and Mornington*, July 17, 1894, not reported.

Garrow, Q.C., for the township of Grey. The application has practically no merits. The plaintiff's tax, and he sues for himself alone, is only a very small sum. The ground of attack is purely technical. The only effective thing he asks is that his township be restrained from passing a by-law which everyone else in the township apparently wants to have passed. The Grey by-law charges effectually only lands in Grey. The initial proceedings are done without any by-law at all: 55 Vict. ch. 42, sec. 569. Section 579 provides that the minor municipalities shall be served with certain things, but not a word is said about a by-law. The major municipality may wait till the minor municipality has examined the report, etc. It is not clear on the language of the statute that the major municipality is not entitled to pass a by-law to raise the whole money. Section 580 indicates there must be a borrowing of the whole money.

[MEREDITH, C.J., referred to *The Corporation of Chatham* Argument.
v. *The Corporation of Sombra*, 44 U. C. R. 305.]

At any rate the initiating municipality borrows the money, however they get reimbursed. The plain intention seems to be that there should be only one borrower, namely, the initiating municipality. In one way or another, Elma must raise sufficient to reimburse Grey a proper proportion of the expense. Every defect pointed out here is cured by registration.

[MEREDITH, C.J.—Not the defect of not providing the rate,—an available rate.]

G. G. McPherson, for the township of Elma.

July 13th, 1895. MEREDITH, C.J.:—

Appeal by the plaintiff from the judgment of Mr. Justice Falconbridge, dismissing his action without costs.

The plaintiff is the owner of the east-half of lot 11, in the sixteenth concession of the township of Elma, and his action is brought for the purpose of having a by-law No. 53, passed by the municipal council of the corporation of the township of Grey, on the 10th day of April, 1894, under the authority of section 585 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, (O.), purporting to impose a tax upon the plaintiff in respect of certain drainage works, for the making and construction of certain drainage works, and to render his lands liable to contribute in the future to the maintenance, preservation, and repair of them, declared invalid, and to obtain a perpetual injunction restraining the corporation of the township of Elma from passing a proposed by-law for raising upon the lands in that township, including the plaintiff's lot, the proportion of the cost of the works, which according to the report of the engineer set out in the Grey by-law, was charged by him on the lands in Elma.

The Grey by-law, as I have said, was passed under the authority of section 585, of the Consolidated Municipal Act, 1892, for the purpose of making certain alterations

Judgment.
Meredith,
C.J.

and improvements in, including a better outlet for a drain called No. 2 government drain, situate within the limits of the township of Grey, which had been constructed under the provisions of the Ontario Drainage Act, 1873, by the Provincial authorities.

The by-law recites the construction of No. 2 government drain, that owing to changed conditions and the use of it for the drainage of other lands than those which it was originally constructed for the benefit of, its outlet is insufficient, and that in order better to maintain it and to prevent damage to adjacent lands, it has been determined to make a new outlet for it, and to otherwise improve and extend it.

The by-law then recites that the council procured an examination to be made of the locality embraced "in the said drainage system," including the said government drain No. 2, by James A. Bell, a provincial land surveyor and civil engineer; and also procured plans and estimates of the work to be made by him; and also an assessment to be made by him of the lands and roads to be benefited by the work, including the lands of those who were using the said government drain No. 2 for outlet, but who did not contribute to its construction, and those who might when the proposed changes should be made, use the drain for an outlet.

The report of Mr. Bell, which is dated January 18th, 1894, is then recited, and it sets out the result of his examination of the drain, and the lands and roads, and reports as to the work necessary to be done to accomplish the object in view of the council, and the estimated cost of it, and his assessment of the lands and roads benefited. By this assessment, lands and roads in Elma are assessed for \$4,617.36 in the aggregate; lands and roads in the township of McKillop, for \$1,914.61; and lands and roads in the township of Grey, for \$9,678.36, making a total of \$16,210.33.

The by-law then recites that the council are of opinion that the making of a proper outlet for and otherwise

improving and extending government drain No. 2 as described, is desirable.

Judgment.

Meredith,
C.J.

And it is enacted (1) that the report, plans and estimates of the engineer be adopted, and the said improvement to government drain No. 2 and outlet, and the works connected therewith, be made and constructed in accordance therewith.

By section 2, authority is given to the reeve to borrow on the credit of the corporation \$16,210.33, and to issue debentures of the corporation therefor, payable in twenty annual instalments of principal and interest, the interest being at the rate of four per cent. per annum.

By section 3, special rates are directed to be assessed and levied for the purpose of raising \$14,975.05, which is stated to be the amount charged against the lands benefited, other than lands and roads belonging to the municipalities, and the interest thereon for twenty years at four per cent. per annum, on the lots and parts of lots mentioned in the section. Then follows a schedule of all the lots and parts of lots charged by the engineer, with any part of the cost of the work, shewing the amount of the charge as fixed by his assessment, and the interest on the sum so assessed, the total amount of the charge; and in another column, the annual assessment for twenty years, required to pay the principal of the charge and the interest.

The next section enacts, that for raising \$1,235.28, the total amount assessed against roads in the three municipalities, and to cover the interest, a special rate of .054 in the dollar over and above all other rates, shall be levied yearly for twenty years upon the whole rateable property in the township of Grey.

The council of Elma was served in accordance with the provisions of section 579, with a copy of the report, plans and specifications, assessment and estimates of the engineer, and they did not appeal against them, and are now proceeding to pass their by-law for the purpose of raising and paying over to the treasurer of Grey, the sum named in the report in accordance with the provisions of section

¹⁰⁰ Judgment. 580; and it is the passing of this by-law that the plaintiff seeks to restrain.
Meredith,
C.J.

The plaintiff bases his claim to relief against the Grey by-law upon the ground that by it the council of that township assumed to enact that a special rate should be assessed and levied, in the same manner and at the same time as taxes are levied, upon his lot, to meet his share of the cost of the proposed work and the interest upon it, and he also claims the right to attack the by-law for other alleged defects in it as being a person entitled under the provisions of section 332 to move to quash it.

There is no doubt that the council of Grey had no authority by its by-law to direct that any special rate should be assessed and levied upon the plaintiff's lands—that under section 580 the council of Elma alone had the power to do—and the by-law was in that respect clearly *ultra vires*.

I do not think, however, that the case is one in which the plaintiff is entitled to the declaration asked for. Such a declaration is unnecessary. The direction to assess and levy the special rate is wholly nugatory and void, and the plaintiff cannot be hurt by it. Such being the plaintiff's position with regard to this by-law, it is unnecessary on this branch of the case to consider the other objections urged by him to its validity—he is not interested in the validity of that by-law nor affected by it, and has, in my opinion, no *locus standi* to question it.

With regard to the Elma by-law, the position of the plaintiff is, that until the council of Grey has passed a valid by-law providing for the making and construction of the work and for raising the proportion of the estimated cost of it, assessed against the lands and roads within the limits of that township, the council of Elma is neither bound nor entitled to pass its by-law under section 580, and that the Grey by-law is invalid because it authorizes the borrowing on its credit of the whole cost of the work, instead of the share of it assessed against the lands and roads in Grey, and does not provide a sufficient special rate to meet the debt

so authorized to be incurred, the special rates directed to be assessed and levied on the lots in Grey, and upon the ratepayers generally in respect of the roads, which are the only special rates which the by-law assumes to direct to be assessed and levied, which are validly imposed, being insufficient to provide as they should for the payment of the debt and interest as they become due, and the deficiency being assumed to be provided by the unauthorized and invalid assessment of special rates on the lots in the other townships concerned.

It may be conceded that notwithstanding the promulgation and registration of the Grey by-law, it is still open to attack by any ratepayer of that township, and that it is not a valid by-law, but conceding this, I am of opinion that the plaintiff's case against the corporation of Elma, fails.

The provisions of section 585 authorize the works with which that section deals to be undertaken and completed under the provisions of sections 569 to 582 inclusive, without the petition required by section 569, the petition then being unnecessary (that being the initial step in the case of a new work) by the combined effect of sections 569 and 585, the initiating council begins by appointing an engineer or surveyor to examine and report on the drain and procuring him to make plans and estimates of the work, and an assessment of the real property to be benefited by it, stating as nearly as may be in the opinion of the engineer or surveyor the proportion of benefit to be derived therefrom by every road and lot, or portion of a lot.

In a case such as this where the works are wholly within the initiating township, the engineer or surveyor if he find that they benefit lands in an adjoining municipality without extending into it, or greatly improve any road lying within any municipality, or between two or more municipalities, is required by section 576 to charge the lands so benefited, and the corporation, person, or company whose roads are improved, with such proportion of the

Judgment.
Meredith,
C.J.

Judgment.
Meredith,
C.J.

cost of the work as he may deem just, and provision is made that the amount so charged for roads, or ascertained by reference, is to be paid out of the general fund of such municipality or company: section 576.

By section 577 the engineer or surveyor is to determine and report to the council by which he is employed whether the works shall be constructed and maintained solely at the expense of such municipality, or whether they shall be constructed and maintained at the expense of both municipalities, and in what proportion.

The engineer or surveyor, where necessary, is to make plans and specifications of the works to be constructed, and charge the lands to be benefited by the work as provided in the Act: section 578.

Section 579, which provides for the initiating council serving the head of the council of the municipality whose lands and roads are to be benefited without the deepening or drainage being continued, with a copy of the report, plans, specifications, assessment and estimates of the engineer or surveyor, and makes them binding on the council served, unless appealed from, has already been referred to.

By section 580, the council which has been served is required within four months after service of the report of the engineer or surveyor, as provided by section 579, to pass a by-law or by-laws to raise and pay over to the treasurer of the initiating municipality such sum as may be named in the report, or in case of an appeal such sum as may be determined by the referee, in the same manner, and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in section 569, and such council is to hold the Court of Revision provided for by sub-section 10 of section 569. Provision is also made for an appeal by the council served to the referee from the report of the engineer or surveyor.

I am unable to see that by these provisions the duty imposed upon the council, served with the report of the engineer or surveyor, to pass its by-law to raise and pay

over the amount named in the report, as its contribution to the cost of work, is at all dependent upon the initiating municipality passing its by-law under section 569; its duty is to pass its own by-law within four months after it has been served with the report of the engineer or surveyor, and to require that a valid by-law should be passed by the initiating municipality for proceeding with the work and raising its share of the cost of it before the other municipality should be called upon to pass its by-law, would, I venture to think, be in conflict with the express provisions of section 580.

Judgment.
Meredith,
C.J.

I do not see that any incongruity exists, or that any inconvenience is likely to arise from giving this construction to the Act. Why should not the initiating municipality be entitled to delay passing its by-law until the other municipalities have provided and paid over to it their shares of the cost of the works. The works have to be undertaken and carried out by the initiating municipality, and it seems to me not unreasonable that it should have in hand the portion of the cost which is to be provided by the other municipalities before it should be called upon to pass its by-law for raising its share; and nothing would be gained by requiring it to pass its by-law in the first instance, because it could not be expected to begin the works or undertake any liability in respect of them until all the moneys which it would be called upon to expend in so doing, were in hand or under its control.

Should the initiating municipality after receiving the shares of the cost of the work to be provided by the other municipalities, fail to pass its by-law, or to proceed with the works, no doubt a remedy would be open to the municipalities, and persons interested, in the way pointed out in *The Corporation of Chatham v. The Corporation of Sombra*, 44 U. C. R. 305, or in some other way.

The Grey by-law shews that the proceedings necessary, in my opinion, to warrant the council of that township in taking steps to require the other municipalities concerned to pass their by-laws, have been taken, and if, as it pro-

Judgment. bably was, it was requisite that these proceedings should
Meredith, be by by-law, we must, I think, in the absence of evi-
C.J. dence to the contrary, assume that the necessary by-laws
were passed.

It seems to me, therefore, that the council of Elma was bound to pass its by-law under section 580, and that the fact that no valid by-law had been passed by the initiating municipality to raise its proportion of the cost of the works, would, in the circumstances of this case, afford no justification or excuse for its not doing so; and *a fortiori* the plaintiff is not entitled to restrain the corporation of Elma from doing so, where it is willing to pass its by-law, and where there is no suggestion that the council of Grey are not acting in perfect good faith, and are not ready and willing to raise their share of the cost of the works, and where they have, as they in fact have, already expended a large sum in constructing the works, the construction of them having been undertaken by them. If it were, though I think it was not, necessary that the council of Grey should, before serving the other municipalities with the report and other documents, have passed a by-law providing for the work being done, I think it has passed a sufficient by-law for that purpose, and that section 1 of its by-law No. 53, is a sufficient compliance in that respect with the provisions of section 569, and that that part of the by-law would be severable from the other provisions of it.

Another objection was made by Mr. Mabce to the Elma by-law, that the notice which is required by section 571, to be published or served with the by-law, was not in conformity with the provisions of that section.

The cases of *In re Ferguson and the Township of Howick*, 44 U. C. R. 41; *Re McLean and the Township of Ops*, 45 U. C. R. 325; *In re Robertson and The Corporation of the Township of North Easthope*, 15 O. R. 423, shew that the absence of or a defect in such a notice does not affect the validity of the by-law, but merely leaves to a ratepayer the full ordinary period for moving to quash the by-law instead of the shorter period to which he is limited where that notice has been published.

But even if the defect in the notice would, if the by-law were finally passed, be a ground for quashing it, the plaintiff's objection cannot prevail as it is not raised on the pleadings, and appears to have been urged for the first time on the argument of this appeal before us, and in any case would not, in my opinion, afford a ground for granting an injunction to restrain the council from passing it, as it would still be open to the plaintiff if the objection were a valid one on a motion to quash the by-law if finally passed.

Judgment.
Meredith,
C.J.

Upon the whole I think that the action was properly dismissed, and that the judgment of my brother Falconbridge should be affirmed, and the appeal be dismissed with costs.

ROSE, J.:—

It seems to me that the directions of the statute 55 Vict. ch. 42, (O.), the Consolidated Municipal Act, as to the procedure which should have been followed, are as follows:

The work was to provide a new outlet, and section 585 gives the power to do this. The machinery to be used was that of sections 569 to 582, inclusive, save that no petition was requisite. Then under section 569, the council of the initiating municipality was empowered to procure plans and estimates, and an assessment stating the proportion of benefit to be derived by every road, lot, or portion of lot. This was done.

Then the council was empowered to adopt the report, plans and estimates—see the first clause of by-law sec. 570—and provide for the work being done in accordance therewith: see the same clause of the by-law, and sub-sec. 1 of sec. 569. By the same by-law the council is empowered to provide for borrowing the necessary funds on the credit of the municipality, *i.e.*, where the whole work is within one municipality, and no other municipality is to be called upon to contribute, then “the funds necessary for the work,” or if it is a case of work being initiated by one

Judgment. municipality and the cost being contributed to by one
Rose, J. other or more municipalities, then "the proportion to be
contributed by the initiating municipality."

The by-law of the initiating municipality should then provide for assessing and levying a special rate on the real property to be benefited within its own boundaries.

This, of course, would leave unprovided for the proportion to be contributed by the municipality or municipalities which are to contribute to the expense; and sections 576 to 581, inclusive, provide for raising their proportions. After the adoption of the report, plans and estimates, by the initiating municipality,—I say after the adoption, for it would seem unreasonable to permit the initiating municipality to do so before adoption,—a copy of the report, plans, specifications, assessment, and estimates, may be served on the contributing municipalities, and if there is no appeal from them they become binding, and it becomes the duty of such municipalities within four months to pass by-laws to raise and pay over to the treasurer of the initiating municipality the sums named in the report to be contributed by them, and such contributing municipalities are to raise such sums by assessing and levying a special rate on the real property to be benefited by the work within their respective boundaries in accordance with the report and assessment in like manner as the initiating municipality is required to do. The engineer, therefore, subject to appeal and revision settles the amounts to be paid by each municipality, the property to be benefited, and the sum to be assessed and levied on each lot or portion of lot and road. There is but one scheme and one assessment, and each municipality, within its own borders, by the like machinery raises the sum which it is bound to contribute. All these sums come into the hands of one treasurer, *i.e.*, that of the initiating municipality which carries on the work and pays its cost.

Here the by-law of the initiating municipality is drawn to raise the whole of the funds, and provides for assessing and levying the same on the three municipalities in the

proportions set out in the report. This is manifestly an error. As I read the by-law of Elma, it provides for raising its proportion from the lots within its borders as set out in the report. This is right if the informalities in the by-law of Grey do not prevent. As a matter of fact, although the Grey by-law purports to levy the whole sum, it is manifest that if it is effective at all, it only provides for raising its own proportion, and assesses and levies upon each lot only its share as set out in the report. A copy of the judgment of my learned brother MacMahon in *Walker v. Township of Ellice*,* has been handed in from which I find the law laid down as follows:—

Judgment.

Rose, J.

“By the amendment to sec. 569, sub-sec. 2, of the Municipal Act by 55 Vict. ch. 43, sec. 52, the initiating township is only authorized to borrow on the credit of the municipality the proportion to be contributed by it, when the work is to be constructed at the expense of two or more municipalities.”

The amendment referred to distinguishes this case from *In re The Corporation of the County of Essex and The Corporation of the Township of Rochester*, 42 U. C. R., see p. 544.

After much consideration, I do not see my way to hold that the contributing municipalities could be required to pass by-laws to raise their respective shares until the initiating municipality had passed, provisionally, a valid by-law adopting the report and providing for doing the work, including the raising of its proportion of the funds. It must be borne in mind that there is only one scheme, initiated and to be carried out by one municipality, under the direction of one engineer, and to be paid for by funds in the hands of one treasurer, and authorized by one by-law, *i.e.*, that of the initiating municipality. The contributing municipalities pass by-laws to raise their respective proportions of the funds, but they pass no by-law authorizing or in any way controlling the work, and their aid in raising the money can be invoked only when and after a valid initiating by-law has been passed provisionally.

* July 17th, 1894, not reported.—REP.

Judgment. Any variation in the assessment made in either the proportion to be contributed by the several municipalities, or by the individual land owners, etc., is to be followed by an appropriate amendment in the initiating by-law, which is the basis of the whole matter and as finally passed, should correctly set forth the whole scheme: see sub-sec. 2 of sec. 570, and sub-sec. 3 of sec. 581.

Rose, J.

The amendments referred to in sub-sec. 3 of sec. 581, relate to the change by reason of revision or appeal; but it seems to me that in the by-law as finally passed, the clause adopting the report should shew that it is adopted in the form settled by the Court of Revision under sub-sec. 10 of sec. 569, or by the Judge on appeal under sub-sec. 15 of the same section, or by the referee under section 581, for the purpose, as I have stated, of having the whole scheme clearly appear in the by-law of the initiating township.

I do not see how the report could be considered as served within the meaning of the Act; or that the four months would begin to run until the initiating township had itself determined to adopt it and the plans and estimates, and to proceed with the work.

The contributing municipality might well ask, "Have you adopted the report? Are you going to provide for the whole of the proposed work, or only a portion thereof being done?" and until the initiating municipality could answer such questions, the contributing municipality could properly take the position that the service of the report, etc., was premature and called for no action on its part. It is clear, of course, that the adoption of the report, etc., and resolution to proceed with the work, must be by by-law.

When Elma discovered that the by-law of Grey, the initiating township, was as to the portion providing for borrowing the funds, *ultra vires*, I think it might well have declined to proceed until Grey had either amended its by-law or given such assurance of *bonâ fide* intention so to do, as would render it prudent in Elma to proceed.

It appears from statement of counsel for Elma, that it is assured of good faith on the part of Grey, and that all necessary amendments will be made, and so Elma is willing to go on with its by-law and raise its proportion of the money. Then has Grey the power to amend? If this were an application by a ratepayer of Grey to quash the Grey by-law, would the Court be compelled to quash the whole by-law, or might it not treat it as composed of two separate and distinct enactments, viz., one adopting the report, plans and estimates, and directing that the works be constructed in accordance therewith; and the other providing for raising the funds necessary for its proportion of the work? And if so, might not the first remain and the second alone be quashed, and might not Grey then well pass an amending by-law providing for raising the necessary funds?

Judgment.

Rose, J.

It will be observed that section 569 provides that "the council may pass by-laws," and it seems to me the plural was used to meet such a case as I have suggested, and to shew that the powers had not been exhausted in passing one by-law.

The power to amend given by sub-sec. 3 of sec. 619, is very wide and the language very general. If it should be held that such sub-section applies, as it says, to "any work or improvement done or constructed under the provisions of this Act," and is not confined to local improvements, then its provisions would probably be sufficient to meet such an emergency as I am now considering.

Then, again, although the form of by-law in section 570, has the words, "provisionally adopted," etc., I venture to think that they have no application to clause 1, enacting the adoption of the report, etc., and the doing of the work. Subject to the right of the council to drop the whole matter, the enactment of clause 1, is once for all—that is to say, the council either adopts or does not adopt—it either enacts or does not enact that the work shall be done. But as to the remaining clauses, the by-law is merely provisional. The Act provides machinery, which, if set in

Judgment.
Rose, J.

motion, may change the proportions in which the municipalities are to contribute the assessment as made by the engineer; and until it appear what will be done, there can be no finality as to such portion of the by-law. Whether such observations be of value or not, I am of the opinion that having regard to the language of section 332, if an application to quash had been made by a ratepayer of Grey, the order quashing might have been confined to the second and remaining clauses of the by-law; and that an amending by-law might at once have been passed remedying the defects.

If clause 1 of the Grey by-law be unaffected, although the remaining clauses be declared invalid, then the service of the report remains valid, and Elma might act upon it. If clause 1 should be declared invalid because the remainder of the by-law was so declared, then it seems to me that a new by-law must be passed, and Elma would be in the same position as if no report had been served, and should not proceed to raise any funds. But if we can support clause 1, then I think Elma may proceed.

If so, it is clear that as long as a ratepayer in Elma is not prejudiced by the passing of the Elma by-law, such ratepayer cannot be heard to complain that Elma is relying on the good faith of Grey, and is proceeding to pass its by-law, especially where such ratepayer does not himself shew any bad faith on the part of either Grey or Elma.

The Grey by-law will require amending as to the amount it provides to borrow; and as to the proposed assessment including the clause as to roads.

Even if the plaintiff had established a right to the intervention of the Court as against Elma, he has not shewn any reason for bringing Grey before the Court. He was in no danger from the Grey by-law—no threats had been made to levy upon his lands or to affect him in any way.

The objection as to the informality of the notice, at the foot of the by-law under section 571, was disposed of in *In re Ferguson v. The Township of Howick*, 44 U. C. R. 41.

See also *Re McLean and the Township of Ops*, 45 U. C. R. 325, and in *Re Robertson and The Corporation of the Township of North Easthope*, 15 O. R. 423.

Judgment.

Rose, J.

The plaintiff has gained nothing by this appeal. It seems to me to have been unnecessary, and I see no reason why he should not pay the costs.

The appeal will, therefore, be dismissed with costs—the defendant, the township of Grey, undertaking to forthwith pass the necessary amending by-law.

MACMAHON, J.:—

After a consideration of the clauses of the Municipal Act, set out in the judgment of His Lordship the Chief Justice, I am of opinion that until the initiating municipality has passed its by-law for the construction of drainage works, a municipality which is being called upon for contribution towards such works has no power to pass a by-law for raising its share of the proposed expenditure. Until the adoption of the report, and the passing of a by-law by the initiating municipality authorizing the work, there is nothing upon which the municipality called upon to contribute can act. This, I think, is apparent from a consideration of the sections of the Act. Take the case of a petition presented under section 569, upon which the council had instructed an engineer to make a survey and prepare plans, estimates, etc. Before any action was taken by the council on the report, any of the petitioners had a right to withdraw his lands from the scheme at any time before the expiration of the time limited for appealing from the assessment: (sec. 569, sub-sec. 22.) And now by the Drainage Act of 1894, secs. 16, 17 and 18 of 57 Vict. ch. 56 (O.), an opportunity is provided at a meeting of the council of which ten days' notice shall be given to all parties assessed within the area described in the petition, to any person who signed the petition to withdraw from it by putting his withdrawal in writing and signing the same. Then if the initiating municipality on being furnished

Judgment. by its engineer with the report, plans, etc., could, without passing any by-law, send copies of such report, etc., to the municipality called upon to contribute, and thus require it within four months to pass a by-law and raise and pay into the treasury of the initiating municipality its share of the estimated expenditure, this strange and never-contemplated result might follow, namely: that the sittings of the Court of Revision which are under sub-sec. 10 of sec. 569, to be held not later than thirty days from the first publication of the by-law, need not be held by the initiating municipality until the money has been paid into its treasury by the contributing municipality; and as by sub-section 22, signers to a petition had liberty to withdraw at any time before the time limited for appealing to the Court of Revision from the assessment, it might turn out that the withdrawals would leave the petition without sufficient signatures upon which to pass a by-law. So under 57 Vict. ch. 56, secs. 16, 17, and 18 (if the contention I am now combatting were to hold good), a meeting of the initiating council need not be called to consider the report of the engineer until after the contributing municipality has raised and paid in its share of the estimated expenditure, while at that meeting the names of a sufficient number of the petitioners might be withdrawn, as would prevent the passing of a by-law, and so render all the proceedings of the contributing municipality (if taken) abortive. This course would be inverting the order of things, as before it was decided that the works were to be constructed, the contributing municipality may have raised its share of the estimated expenditure by the issue of debentures, or by discount at a bank, and in the event of the initiating municipality by the withdrawal of some of the petitioners becoming powerless to pass a by-law, there is no means of reimbursing the contributing municipality for the loss resulting from the issue of debentures, or the interest payable thereon, etc.

Suppose the report, etc., having been sent to the municipality sought to be made a contributory, four months had

elapsed without a by-law being passed, could the initiating municipality compel it to pass a by-law? Clearly not. A complete answer would be that the initiating municipality had not signified its intention of constructing the work which could only be signified in the manner provided by the Act,—by passing a by-law.

Judgment.

MacMahon,
J.

I fail to see the principle whereon a distinction can be based between the duty of the council of the initiating municipality where they are proceeding on petition under section 569, and where they are proceeding under section 585, where a petition is dispensed with.

I entirely concur in the opinion of the other members of the Court, that although the Grey by-law was *ultra vires*, it was powerless to injure a person against whom it had struck a special rate as a contributory in Elma. And it may also be, as pointed out by my learned brother Rose, that that by-law may be considered as consisting of two parts; the one adopting the report, plans, etc., and providing for the construction of the work; and the other striking the special rate or assessment to provide the necessary funds for its completion; and that the former is all with which the municipality of Elma is concerned, to enable it to pass a by-law to raise its proportion of the required expenditure; that the Grey by-law, although it professes to raise the total sum required for the completion of the works, has only authority by statute to levy a special rate on the lands to be benefited within that municipality, which has been provided for in the by-law; and the special rate the by-law purports to levy against lands in other municipalities being wholly unauthorized and incapable of enforcement, may be regarded in the light of surplusage.

I, therefore, (not without some hesitation,) assent to the conclusions reached by the other members of the Court.

A. H. F. L.

[COMMON PLEAS DIVISION.]

STEWART V. WOOLMAN.

New Trial—Jury—Improperly Influencing—Treating to Drink.

Where the plaintiff during the trial had conversation with members of the jury upon the subject of his case, and his brother and also his solicitor had treated some of them to "drinks" during the recess of the Court, the verdict in plaintiff's favour was set aside, and a new trial ordered.

Statement.

THIS was a motion before the Common Pleas Divisional Court to set aside the verdict obtained in this action, and for a new trial. The action was brought by John Stewart against Abbott Woolman as maker, and William Ambler as endorser of a promissory note, and was tried at Barrie before FALCONBRIDGE, J., and a jury, on the 26th and 27th of April, 1895, when the jury returned a verdict for the plaintiff for \$432, and for the defendant on his counter-claim for \$130 and interest, and judgment was directed to be entered for the plaintiff for \$342 with costs, according to the County Court scale without right of set-off.

This motion was by the defendants to set aside the verdict and for a new trial, on the grounds: (1) That the verdict was perverse and contrary to law and the evidence, and the weight of evidence, and the charge of the learned Judge; and (2) That members of the jury before which the action was tried, were approached and tampered with by the plaintiff, or his agents, during the course of the trial.

The evidence was concluded on the 26th of April, and the addresses of counsel and the charge of the learned Judge were delivered on the 27th, on which day the jury gave their verdict.

The effect of the affidavits filed on behalf of the motion in connection with the second of the above grounds, was, that on the evening of the 26th of April, after the evidence was all in and the jury allowed to retire after being warned in the usual way by the Court, Joseph Stewart, a brother of the plaintiff, being also one of the plaintiff's witnesses,

followed a juryman named Armstrong to his hotel, invited him to have a drink, which he did, and also asked him to have a walk, which, however, he refused, telling him that he was "barking up the wrong tree"; and that Stewart then went away in company with another of the jurors named Craig; that on the same evening two other of the jurymen, Sanderson and Young, were overtaken on the way to their hotel by the plaintiff's solicitor, who said he would like to have a glass of beer with them, but he did not think it would be right as they were on the jury, adding, however, that it would be no harm if no one mentioned the case; and that they then went to the hotel and had some beer with the plaintiff's solicitor, who afterwards left in company with one of them; that on April 25th, Joseph Stewart was seen talking for a long time to Craig in and near the Court House, and was seen talking to him again in the hotel on the evening of April 26th; that on the evening of April 26th, the plaintiff and his solicitor were seen in conversation with Orchard, another of the jurymen; that a day or two before the trial the plaintiff said to one Gregg, a veterinary surgeon, who was attending to a horse of the plaintiff, that he could not come with him to see the horse, because he was "around jollyng some of the old coons on the jury," this being deposed to by Gregg, though denied altogether by the plaintiff.

Statement.

The purport of the affidavits filed in answer on behalf of the plaintiff is sufficiently indicated in the judgment of MACMAHON, J.

The motion was argued on June 4th, 1895, before MEREDITH, C. J., and ROSE, and MACMAHON, JJ.

H. Strathy, Q. C., for the defendants. What takes place in a jury room, shewing how the jury arrived at a verdict, cannot be shewn. But this is a different case: *Campbell v. Jackson*, 29 C. L. J. 69; *Armour v. Boswell*, 6 O. S. 352, at p. 356; *Knight v. The Inhabitants of Freeport*, 13 Mass. 217; *Nasmith v. The Clinton Fire Ins. Co.*, 8 Abb. Pr. (N. Y.) 141, 146-7; *Thompson on Trials*, p. 1921, secs. 2559-60.

Argument. *H. Lennox*, contra. It is almost necessarily the case in a county town like Barrie that parties will be seen any trial day talking to some of the jury. Such a fact unexplained would not justify a new trial. But it is explained here. There is no circumstance here taken alone which the Court can reasonably consider calculated to prejudice the trial. If the same activity was always shewn, as in this case, in seeking a new trial on such grounds as here, the application for new trials would be innumerable.

June 29th, 1895. MACMAHON, J.:—

No one desires to control in the slightest the free intercourse of jurors with their friends and fellow men when permitted to separate during the progress of a trial. But jurors should exercise the greatest care and discretion by not permitting any communication to be made by a litigant or his friends as to the merits of the litigation in which the juror is required to give a verdict; nor should a juror allow himself to be entertained by a litigant or his friends, or solicitor.

“Where a juror has been treated, fed or entertained by the successful party or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted. This rule is, by most Courts, deemed indispensably necessary to preserve the integrity of juries. It being, as already stated, a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right”: Thompson on Trials, sec. 2564. The text is supported by a number of authorities to which may be added *Hughes v. Budd*, 4 Jur. 150; *Armour v. Boswell*, 6 O. S. 352, pp. 358-9.

An endeavour has been made to meet some of the charges of impropriety made against the plaintiff, his brother Joseph, and the solicitor Mr. Lennox. But the affidavit of Isaiah Armstrong has not been met or attempted to be met, and that shews clearly that Joseph was solicitous as to the result of the trial and action, on behalf of his brother, and we find him treating two

jurymen and asking Armstrong, whom he apparently does not know, to go out for a walk, and Armstrong's repulse shewed that he supposed Stewart had some improper motive when he was approaching a jurymen in that way. Joseph and Craig are friends, as they leave Livingstone's hotel together, although Craig swears he did not go "to any hotel with the plaintiff or his brother during the trial." Joseph's affidavit makes no denial of the treating of Armstrong and Craig at Livingstone's, nor does he explain his reason for desiring Armstrong to go with him for a walk.

Judgment.
MacMahon,
J.

No matter who paid for the treat to Sanderson and Young, it was Lennox who first spoke of it and of his liking to have a glass of beer; and he regarded the treating as being dangerous, and something that he should not do, for on reaching the hotel, he warns them that the case must not be alluded to. The case was uppermost in his mind, but he says to the jurymen, "I will guard against evil results following from my act by imposing silence as to the litigation, as to which you are acting as judges of the facts."

Then Joseph Stewart was seen conversing with W. M. Craig a jurymen on the case, on several occasions before and during the trial. In the affidavit of Craig, the phrase that is used in denying the alleged conversations between Joseph and himself as to the litigation is: "I was not approached either by the plaintiff or any person on his behalf," etc. The word "approached," has several significations, but the only meaning which could properly be given to it in the connection in which it is here used, is approached with a view to corruptly influence the juror. There is not a word of denial as to Joseph having had conversations with him on different occasions, when the litigation was discussed. These conversations may well have taken place, although the deponent may not have been approached in the way indicated.

Then in regard to Orchard, the plaintiff states that "I said nothing that in my mind would influence him in any way." He does not deny speaking about the suit to

Judgment. Orchard, and he is not to say what influence it had on the
MacMahon, juror's mind.
J.

Then Orchard, in his affidavit, makes use of the same expression: "I have not been approached by any person or persons," the draftsman ignoring the matter of conversations or statements made by the plaintiff to the juryman, and answering something that was not charged, namely, that the juryman had been approached with the view of corruptly influencing him. Young, in his affidavit, makes use of the same expression: "I was not approached by any one," etc.

I do not now consider the statements in Gregg's affidavit, as they are absolutely denied by the plaintiff. But it is singular to say the least, that a man would have left himself open to a charge of perjury by asserting he was attending in his professional capacity a horse of the plaintiff's at a certain time when, if untrue, the falsehood was capable of being substantiated beyond question.

In *VanMere v. Farrell*, 12 O. R., at p. 294, Cameron, C. J., made use of these observations: "There is nothing more important than that litigants should be made thoroughly to understand that any attempt to unduly influence the due course of justice by interference with the jury, or those whose duty it is to decide between them, will prevent the enjoyment of any success that may actually or possibly be obtained thereby." See also the judgment of Pollock, C. B., in *Allum v. Boulton*, 9 Exch., at p. 741, and *Campbell v. Jackson*, 29 C. L. J. 69, affirmed by the Court of Appeal.* (Not reported.)

The following pertinent observations regarding the point now being considered, were made by Pierpoint, J., in *Nasmith v. The Clinton Fire Ins. Co.*, 8 Abb., at p. 146: "It should be made the interest of both parties to

* April 20th, 1893. The Court of Appeal refused to interfere with the discretion of the County Judge in granting a new trial, on the ground that improper attempts had been made to influence the verdict of the jury: HAGARTY, C. J. O., being of opinion that the facts disclosed fully warranted the judgment, OSLER and MACLENNAN, JJ.A., concurring in the result—dismissing the appeal.

prevent, as far as possible all improper interference with the jury; and though in a particular case the rule may operate with severity, yet it were far better that ten righteous verdicts should be set aside where the jury have been tampered with, than one verdict should stand where the jury have been approached, and about the justice of which verdict the Court entertains a doubt.”

Judgment.
MacMahon,
J.

The learned trial Judge informs us that he is dissatisfied with the verdict, and in the interest of public justice, the only course open to us is to set aside the verdict and the judgment directed to be entered thereon, and to order a new trial; the costs of the last trial and of this motion to be costs in the cause to the defendant in any event.

MEREDITH, C. J. :—

I agree in the conclusion to which my learned brothers have come, and I desire to say a few words only as to the reasons which lead me to do so.

I do not think in the face of the positive denial by the plaintiff of the statement made in Gregg's affidavit that I should be justified in coming to the conclusion that the charge which the latter makes against him is proved, but I think that there is sufficient admitted by the plaintiff or proved and not contradicted, to warrant my deciding that the verdict of the plaintiff cannot be retained by him. He admits in substance that he discussed with jurors who were sworn to try this case, the facts of it, although he says that he said nothing that “in his mind was intended to influence them.” These discussions took place after the jury had been sworn and the principle upon which awards are set aside where the arbitrator has heard a statement with regard to the case from one of the parties in the absence of the other, applies, I think, with equal force to statements made by a litigant to a juror who is called upon to pass between him and his opponent on the facts in issue in an action. The affidavit of Isaiah Armstrong shews that the plaintiff's brother and principal witness

Judgment.
Meredith,
C.J.

was anxious to confer with him, and I think it must be taken with regard to the case, and there is no denial of Armstrong's statement, and he too was one of the jury sworn in this case. It is also shewn that members of the jury, two at least, were treated in a tavern by the plaintiff's brother Joseph, and that the plaintiff's solicitor drank with another member of the jury during the progress of the trial. Accepting the explanation of the solicitor that there was no improper motive in this and that there was no discussion of the case, I do not think that either he or his client can justly complain if we adopt his own conclusion as to his act, expressed at the time, that it was not a right one.

It is of the greatest importance to the proper administration of justice that litigants and their solicitors should understand that any communication by them with, or conduct with regard to the jurors empanelled to try their case, or who may be called on to do so, designed or calculated, directly or indirectly, to influence them or to bias their judgment, whether such communications or conduct have in fact had the desired effect, or any effect, will, at the least be visited by taking from them the advantage which they would otherwise have derived from a decision in their favour, and subject them to the payment of the costs of the proceedings which have been rendered abortive by their improper actions.

I have less hesitation in coming to the conclusion which I have reached, as the learned Judge before whom the case was tried, is of opinion that the verdict was not a satisfactory one, though had the fate of the defendants' application depended upon the success of their attack upon it, on that ground, I should not have felt warranted in giving effect to their motion.

ROSE, J. :—

I agree that there must be a new trial.

As said by Field, J., in *The Queen v. The Justices of Great Yarmouth*, 8 Q. B. D. 525, at p. 527: "The administration

of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it, to throw on it a substantial doubt.”

Judgment.
Rose, J.

Again, in *Proctor v. Williams*, 8 C. B. N. S. 386, Erle, C.J., said, at p. 389, speaking of another tribunal: “It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal.” In *Darling v. Pierce*, 15 Hun (N. Y.) 543, it is stated at p. 549: “Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the Judge.”

It necessarily follows that if a party to a suit being tried before a Judge or jury, by intent or indiscretion, place the Judge or jury in such a compromising position as to give rise to suspicion of want of fairness or integrity, or to throw a substantial doubt upon the impartiality of the tribunal, such party cannot complain if a decision made by such tribunal, is at the instance of the opposite party, set aside, and a new trial granted so that all grounds of suspicion may be removed, and especially so, when as here, the result arrived at is unsatisfactory.

To say the least, the conduct of the plaintiff, his brother and his solicitor, has been indiscreet. They have been in communication with the jurors sworn to try the facts under such circumstances, as most naturally raised suspicion in the minds of the defendants, and have been guilty of acts of such questionable propriety that they had to be guarded by warnings and compel explanations and excuses.

The explanations have been analyzed by my learned brother MacMahon, and have not satisfied his mind; and I also am not satisfied, and while the excuses, if accepted, might prevent a finding of intentional wrong-doing, they of course do not establish that the proprieties have not been violated.

It is better that parties to suits before the Court for trial, and their solicitors, should clearly understand that all and any communications had with the jury, will be most

Judgment. strictly enquired into, than that the idea should prevail
Rose, J. that laxity will be permitted.

There should be a new trial with costs of the last trial and of this motion, in the cause to the defendants in any event.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

THE CONSUMERS' GAS COMPANY OF TORONTO

v.

THE CORPORATION OF THE CITY OF TORONTO.

Assessment and Taxes—Toronto Gas Company—Mains and Pipes laid under Streets— Mode of Assessment—55 Vict. ch. 48, (O.).

The mains and pipes of the Toronto Gas Company laid under the public streets are assessable under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), as appurtenant to the land owned by the company for the purposes of its business.

Semble, that the proper mode of assessment in a city divided into wards, would be to value the concern as a whole and then apportion rateably to the wards so much of the value as falls to that part of the concern territorially situate in each locality.

Statement. THIS was a special case submitted to the Court, which stated the following facts:

1. The facts set forth and admitted in this case are admitted solely for the purpose of this action, and except in this action neither of the parties thereto is to be held bound by such admission.

2. The Consumers' Gas Company of Toronto was duly incorporated, and *inter alia*, had and has the right to lay mains and pipes upon and under the streets and highways of the city of Toronto, as shewn in its Act of incorporation and the Acts amending the same, and thereby to convey gas manufactured by it at its works situate in Ward No. 2 of the said city, to the consumers thereof, upon properties fronting or abutting upon the various streets and highways of the said city.

3. The said company, pursuant to such powers, did lay mains and pipes in and under the said streets and highways from its said works, which mains and pipes were in the year 1893, of at least the value of \$500,000. Statement.

4. During the year 1893, and prior thereto, there was an assessment commissioner and a board of assessors in and for the said city of Toronto.

5. One of the said assessors during the year 1893, assessed the said company for 1894, in the assessment roll for Ward No. 2 in said city, as shewn in the assessment roll; and in the sum of \$653,000 set out under the column headed "value of buildings" was included the sum of \$500,000 in respect of the said mains and pipes so laid as aforesaid.

6. Some of the said mains and pipes included in the said sum of \$500,000 are situated in each of the six wards of the city of Toronto.

7. Notice of such assessment was duly given to the company, which company appealed against the said assessment to the Court of Revision for the said city.

8. The Court of Revision confirmed the said assessment, and the company then appealed to the proper County Judge in that behalf.

9. On the hearing of the said last mentioned appeal it was admitted by the said company that the assessment upon its buildings was \$64,500 less than their true value, and the company consented to this assessment being increased by that sum. The said Judge was then asked to consider, and consider only, the question of whether the mains and pipes belonging to the said company and laid in the city streets, and attached to the said plant and buildings, were exempt from taxation, and after hearing the arguments adduced by the solicitors for the said company, and for the defendants, the said Judge decided that the said mains and pipes were assessable, and confirmed the said assessment, but at the request of the said company specially shewed that the mains and pipes were assessed at \$500,000, and amended the roll.

Statement.

10. The said company is a company investing the principal part of its means in gas works, within the meaning of sub-section 2 of section 34 of the Assessment Act.

11. If the Court should be of opinion that the assessment of the said mains and pipes is illegal, then judgment is to be entered for the plaintiff for \$7,940,* and interest thereon from the 10th day of July, 1894, with the costs of this action.

12. If the Court should be of opinion that the said assessment is in part illegal, by reason of all of said mains and pipes being assessed in Ward 2, or otherwise, then it is to be referred to the County Judge to ascertain the value of the mains not assessable under such assessment, and to fix what part of the said taxes should be returned to the plaintiffs based upon the reduced assessment so ascertained by him, and the portion of the said sum of \$7,940 that may be so fixed by the said County Judge shall be payable to the said company, with interest thereon from the 10th day of July, 1894; and the costs in such case are to be in the discretion of the said County Court Judge.

13. If the Court should be of opinion that the said assessment is legal, then this action is to be dismissed with costs to be paid by the company to the defendants, the said corporation, forthwith after taxation thereof.

The case was argued before BOYD, C., on June 4th, 1895.

D. McCarthy, Q. C., and W. N. Miller, Q. C., for the plaintiffs, referred to Lister v. Pickford, 34 Beav. 576; The People ex rel. The Citizens' Gas Light Co. of Brooklyn v. The Board of Assessors of the City of Brooklyn, 39 N. Y. 81; In re Calgary Gas and Waterworks Co., 31 C. L. J. 310; Burroughs on Taxation, p. 189; In re Appeal of St. Catharines and Welland Canal Gas Light Co., 30 C. L. J. 205; Ontario National Gas Co. v. Gosfield, 18

*This was the amount paid by the plaintiffs under protest upon the said assessment of \$500,000 upon the pipes and mains.

A. R. 626 ; The Assessment Act, 1892, 55 Vict. ch. 48, Argument. sec. 2, sub-secs. 7, 9, and 10, and secs. 14, 15, 119, 137.

C. Robinson, Q. C., and *Thomas Caswell*, for the defendants, referred to the Interpretation Act, R. S. O. ch. 1, sec. 10 ; Cooley on Taxation, 2nd ed., pp. 204, 368 ; the definition of "land" in the Municipal Act, R. S. O. ch. 184, sec. 2, sub-sec. 7 ; *Metropolitan R.W. Co. v. Fowler*, [1893] A. C. 416.

July 2nd, 1895. BOYD, C.:—

I have considered the legal question submitted as to the right to tax the mains of the gas company for municipal purposes, and entertain no doubt that they are subject to such taxation under the Ontario Assessment Act. The only thing that causes momentary hesitation is the decision in *The Toronto Street Railway v. Fleming*, 37 U. C. R. 116, but the likeness of that case to this is merely superficial both legally and physically. That arose respecting a track on the surface of the street and forming necessarily a part thereof, so that exclusive possession or enjoyment could not be attributed to the defendants ; this is a case of pipes buried permanently in the soil under the street of which the company has the exclusive beneficial possession and occupation by virtue of a statutory title. This broad distinction, involving essential difference of occupation, exists as between the street railway track on the surface and the gas company's main pipes under the street, so that the *Fleming Case* loses pertinence with reference to the species of property now under discussion.

Having thus stated the conclusion it may be desirable to indicate by what means I have reached it. The question is whether main pipes laid down in the streets of Toronto by the gas company (defendants) are assessable.

We start with the broad enactment: Consolidated Assessment Act, 1892, 55 Vict. ch. 48, sec. 6, that "all property in the Province shall be liable to taxation." That by the interpretation includes real and personal property as defined in the Act.

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If personal property merely they are not liable by 55 Vict. ch. 48, sec. 34, sub-sec. 2, by which the personal property of a company which invests the principal part of its means in gas work are exempt from assessment.

If real property they are liable unless covered by 55 Vict. ch. 48, sec. 7, sub-sec. 6, which exempts "every public road and way or public square."

These are the points to be investigated: if not personalty, then the mains, so placed, must be realty; and if realty are they part of the public streets and so exempt? Now the object of exempting personalty of this and kindred companies is brought out in the earlier form of section 34, where it is said: "In companies investing their means in gas works * * requiring the investment of the whole or principal part of the stock in real estate already assessed for the purposes of carrying on such business, the shareholders shall only be assessed on the income derived from such investment": R. S. O. 1877, ch. 180, sec. 29, sub-sec. 2. The exemption of personalty in gas companies is because their realty is already assessed and to avoid double or over-burdensome taxation. These gas mains are essential for carrying on the business of the company, and form a part of the gas works attached to the buildings where the gas is manufactured or stored as much as the most permanently fixed machinery can be attached. The junction of pipe and pipe and of the whole with the main buildings must be maintained with the tightest connection, so that if the ramifications of branch mains were on the land of the company there could be but one opinion as to the whole system of piping being fixtures. Such a construction of pipes would seem to fall aptly within the compass of meaning given to the term "land" in the Assessment Act, 1892, viz., "all machinery or other things so fixed to any building as to form in law part of the realty": 55 Vict. ch. 48, sec. 2, sub-sec. 9. See *The Queen v. Lee*, L. R. 1 Q. B. 241.

But what is the character of the main pipes having regard to their location and site under the land the surface of which is street? The right of the company so to place their mains is

granted and assured by public statute, 11 Vict. ch. 14, sec. 13, by which there is the right to break up, dig and trench the streets and squares and public places of the city, re-establishing such streets and squares thereafter so as to preserve free and uninterrupted passage thereon. The company may also take up, renew, alter and repair these mains from time to time, on like conditions as to passage by the public. There is no period of limitation to this measure of enjoyment and occupation of the soil under the streets for the use of the mains, and the status of the gas company is recognized by a later Act which makes it lawful for the city, with the consent of the gas company, to acquire the whole of the machinery, works, plant, mains and other pipes, including the cost of laying the same, supplies, business assets, rights, franchises and privileges, easements and other property of every nature and kind, both real and personal: 40 Vict. ch. 39, sec. 14; the whole to be valued as a going concern. The whole "going concern" of this gas company is in law and in fact an integral undertaking, of which all the essential parts and apparatus (apart from land and buildings proper) are to be regarded as fixtures partaking of the realty, or appurtenances annexed to the land held and owned by the company for the purpose of its business. These main pipes being sunk and buried in soil under the streets by legislative sanction are not to be regarded any longer as mere fixtures, but as necessary appendages of the work forming with the land occupied appurtenances to the company's central land and buildings on which the manufacture of gas is conducted. Land is not usually appurtenant to land, but the soil underground and beneath the streets which is used for the support and protection of the company's mains and which is thus occupied by the company may be properly appurtenant to land owned by them in fee simple.

As fixtures I think the mains would be assessable, but, the better view is to treat the mains and so much of the soil as is used therewith as realty of the company, and in

Judgment.

Boyd, C.

Judgment. this aspect assessable. As to this underground soil, the
Boyd, C. gas company is both "owner" and "occupier" within the meaning of the Assessment law of Ontario. This conclusion is amply supported by the authority of English decisions, some of which I may cite.

The precise question as to the right to tax in respect of gas pipes laid in the public roads was determined in 1826, in *The King v. The Brighton Gas Light and Coke Co.*, 5 B. & C. 466. The company was empowered to break up the soil of the streets and roads, dig and sink trenches and lay pipes, and to alter the position of and to repair and relay such pipes. Bayley, J., said, at pp. 470-1: "The pipes are laid down so as to become part and parcel of the land for the time they remain, they thereby improve the value of the land in the same manner as buildings erected upon the land, and the whole must be rated accordingly." Holroyd, J., at p. 472, said: "So long as the company used the land for the purpose of their pipes they were rateable, for they have the exclusive occupation of that part of the land in which their pipes lie." Littledale, J., said, at p. 472: "Here the pipes being fixed to the land, the land and pipes are to be considered as one entire thing, * * and the company were in exclusive occupation of that portion of the land in which the pipes lay."

It was again held in *The King v. The Governor and Company of the Chelsea Waterworks*, 5 B. & Ad. 156, (1833), that as to underground pipes in a public park the water company had the exclusive right in a portion of the soil for which they were rateable, though the surface was rated to the ranger for the herbage growing thereon. Again the matter came up in 1859, in *The Queen v. The Company of Proprietors of the West Middlesex Waterworks*, 1 E. & E. 716, and Wightman, J., held that the mains were fixed capital vested in land. "The company," he said, at pp. 720-1, "is in possession of the mains buried in the soil, and so is, *de facto*, in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas com-

panies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute.”

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So in the case of telegraph companies the same rule applies whether the wires are carried above or underneath the soil of the highway : *The Electric Telegraph Co. v. The Overseers of Salford*, 11 Exch. 181, (1855). The Court gave effect to the legal definition of land as including not only the face of the earth but everything under it or over it, and that definition is not ruled out by our Assessment Act which says “land” shall “include” such and such meanings, not that all others legally possessed by the word shall be excluded : 55 Vict. ch. 48, sec. 2, sub-sec. 9. The Judges in 11th Exchequer point out that the occupation by wires and pipes is different from an easement, because it is a continuous occupation. The distinction between an easement which is a qualified right and an exclusive right to occupy and enjoy a portion of the soil is well brought out in *The King v. The Company of Proprietors of the Mersey and Irwell Navigation*, 9 B. & C. 95.

Exclusive enjoyment without exclusive occupation would not be enough to render the subject rateable : *Paris and New York Telegraph Co. v. Penzance Union*, 12 Q. B. D. 552. If you find not merely a casual and occasional, but an exclusive and permanent occupation and equipment of a part of the soil that is a rateable interest in land : *The Lancashire Telephone Co. v. The Overseers of Manchester*, 13 Q. B. D. 700, 705. And it is affirmed as a general principle of law by James, L. J., in *Cory v. Bristow*, p. 55, that “where any part of the soil is permanently occupied by anybody for profitable purposes, as for instance where it is occupied by a company by means of its water or gas pipes, or telegraph posts, then the persons so occupying is rateable in respect of such occupation” : 1 C. P. D. 54 ; *S. C.*, in appeal, 2 App. Cas. 262. As to permanence, Lush, L. J., in *The Queen v. The Assessment Committee of St. Pancras*, 2 Q. B. D. 581, defines it not in the sense of being continuous in

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its use, but in the sense of being permanently attached to the ground as a fixture : p. 589, and lays it down that the ruling element in the cases of water mains and gas mains is that "by the mode of attachment the chattel has been merged in the soil, so that by means of that which has been embedded in or fixed to the land the owner of it occupies the land itself" : p. 589.

The view taken by Lord Campbell in *The Governor and Company of Chelsea Waterworks Co. v. Bowley*, 17 Q. B. 358, stands alone, and is not to be followed in case it appears that the gas or water pipes are permanently and continuously lodged in the ground. The kernel of that decision was that water pipes were mere chattels which might be removed and laid down elsewhere at any time. That is a very limited view of the question where one is dealing with the company as a going concern ; the pipes in such a case are fixtures placed in soil for the purpose of continuous and exclusive user of soil and pipe, and according to the highest authorities such a user passes the property or ownership in so much of the land as is thus used : see *per* Lopes, L. J., in *Reilly v. Booth*, 44 Ch. D., at p. 26, quoted with approval by Lord Ashbourne in *The Metropolitan R. W. Co. v. Fowler*, [1893] A. C., at p. 428. See also *The Queen v. The East London Waterworks Co.*, 21 L. J. Mag. Ca. 174, and *Regina v. Stevens*, 12 L. T. N. S. 491.

The same conclusion has been arrived at in Scotland by an independent course of reasoning, and upon statutes perhaps more nearly akin to our Assessment Act than those relating to the English poor law, which I have chiefly cited. I refer to the Scottish case of *Hay v. The Edinburgh Water Co.*, 12 Ct. of Sess. N. S. 1240, (1850), and affirmed in the Lords, 1 Macq. 683, (1854).

The same conclusion as to assessability exists under the French system of law, and also in Quebec : *Sherbrooke Gas and Water Co. v. Corporation of the City of Sherbrooke*, 15 L. N. 22, in which will be found a reference to the French decisions.

A minor matter was discussed as to the manner of rating if the right to assess existed. I do not give judgment on this, but merely express my opinion that the correct method would be to value the concern as a whole, and then apportion rateably to the wards or the municipalities, so much of the value as falls to that part of the concern territorially situate in each locality. That seems to fit the statute better than to assess the whole at the central point where the manufacturing operations of the company are conducted: see *Sheffield United Gas Light Co. v. Overseers of Sheffield*, 4 B. & S. 147, and *State Railroad Tax Cases*, 92 U. S. R., at p. 608.

Judgment.

Boyd, C.

Pursuant to the provisions of the special case, as I find this assessment to be legal, I therefore dismiss the action with costs.

Since writing the above the case of *Holywell Union v. Halkyn Drainage Co.*, [1895] A. C. 117, has appeared, to which I may refer as of pertinence to the main question already discussed; and see also *Sculcoates Union v. Dock Co. at Kingston upon Hull*, [1895] A. C. 137, as to the manner of rating.

A. H. F. L.

[COMMON PLEAS DIVISION.]

COBBAN V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Damage to Goods—Negligence—Evidence of—Conjecture—51 Vict. ch. 29, secs. 226, 246 (D.)—Reduced Rate—Release of Company from Negligence.

Where the findings of the jury as to the grounds of negligence in an action against a railway company for damage to goods were based on mere conjecture, the verdict for the plaintiffs was set aside, but as it could not be said that there was no evidence of negligence on other grounds, a new trial was directed.

Per MACMAHON, J., dissenting. A presumption of negligence arose from the non-delivery of the goods, and the plaintiffs were not bound to shew any particular acts of negligence.

The plaintiffs' agent shipped a quantity of plate glass by defendants' railway, signing an agreement that in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents—a third-class rate, and a double first-class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the Governor in Council under sec. 226 of 51 Vict. ch. 29 (D.), "The Railway Act," the said classification stating that the third-class rate applied where the goods were "shipped at owners' risk—shipper signing special plate glass release form." The plaintiffs' agent was aware of the two rates, and signed the agreement assenting to the lower rate, under the belief that the defendants could not under section 246, take advantage of the provision absolving them from liability where the damage was occasioned by negligence. No by-law approving of the company's tariff under which these rates were charged had been approved of by the Governor in Council, although a by-law fixing a first-class rate of sixty-six cents and a third class rate of fifty cents had *inter alia* been so approved :—

Held, per MEREDITH, C. J., that notwithstanding the payment of the lower rate, and the agreement signed by their agent, the defendants could not, under section 246, relieve themselves from liability when negligence was proved.

Per ROSE, J. The third-class rate was the only rate "lawfully payable." If only one rate is fixed the provision in the freight classification as to release was *ultra vires* as contrary to the provisions of section 246.

Per MACMAHON, J. No by-law fixing the rate at sixty cents having been approved of by the Governor in Council, there was no freight "lawfully payable," without which there could be no alternative rate, and the release which would otherwise have been valid, was inoperative.

Statement.

THIS was an action brought to recover damages for the loss, through the alleged negligence of the defendants, of a quantity of plate glass which had been forwarded by the defendants' line of railway from Montreal to Toronto, to be there delivered to the plaintiffs.

The action was tried before STREET, J., and a jury, at *Statement*, Toronto, at the Autumn Sittings of 1884.

The evidence, so far as material, appears in the judgment of the Chief Justice.

The following questions were submitted to the jury:—

“1. Q. Were the defendants guilty of negligence which led to the loss of the glass in question? A. Yes.

“2. Q. If the defendants were guilty of negligence in what did such negligence consist? A. In running too fast speed for the freight train. The improper inspection at last place of inspection.”

Upon these findings judgment was entered for the plaintiffs for \$1,487.17, there being no dispute as to the amount of the damages.

The defendants moved against the findings of the jury upon the ground that there was no evidence to support them, and from the judgment of the trial Judge entering judgment upon them in favour of the plaintiffs, and from his refusal to nonsuit the plaintiffs; and they asked that judgment be entered dismissing the plaintiffs' action, or for a new trial.

In Michaelmas Sittings, November 19th, 1894, before a Divisional Court, composed of MEREDITH, C.J., ROSE, and MACMAHON, J.J., *Wallace Nesbitt* and *MacMurchy*, supported the motion.

There was no evidence of negligence to go to the jury; the grounds on which negligence was based are:—As to the manner of loading; the want of proper inspection, and running at too fast a rate of speed. As to the loading, it is unnecessary to discuss this, as the jury have found that there was no improper loading. Then, as to the inspection, it is claimed that the evidence disclosed that no proper inspection had taken place at Havelock, the last place at which the train stopped before the accident happened. The evidence, however, shews that the usual inspection took place; but even assuming that the defendants are bound by the finding of the jury that there was a want of

Argument. inspection there, this had nothing whatever to do with the cause of the accident, if as claimed, the accident was caused by excessive speed. Then as to the rate of speed: there was clearly no evidence to warrant this as at the most it was a mere matter of conjecture, and this is not sufficient to warrant a finding against the defendants. The mere happening of the accident is not, in itself, evidence of negligence. *Bevan on Negligence*, 2nd ed., 143; *Roberts v. Mitchell*, 21 A. R. 433. In any event the special contract exonerates the defendants. If the plaintiffs wished to impose a liability on the defendants, they should have paid the rate allowed by the by-law, but instead, they pay a lower rate, agreeing that in consideration of the defendant company carrying the goods at such lower rate, it is to be free from all liability. The Act in no way precludes a contract being entered into with a shipper of goods whereby the company may be relieved from liability by reason of their carrying the goods at a less rate than that allowed by the by-law fixing the tolls to be levied: *Vogel v. Grand Trunk R. W. Co.*, 11 S. C. R. 612, 617; *Macnamara on Contracts*, 152; *Carr v. Lancashire, etc., R. W. Co.*, 21 L. J. N. S. Ex. 261; *Re Oxlade*, 1 C. B. N. S. 455; *Batson v. Donovan*, 4 B. & Al. 21. Legislation of this kind interferes with freedom of contract, and must be strictly construed. The next point is the defendants are relieved by reason of the failure to give notice within thirty-six hours: *McMillan v. Grand Trunk R. W. Co.*, 16 S. C. R. 543. In any event, the defendants have a remedy over against the defendant Thompson, who was made a third party.

D. E. Thomson, Q.C., and *J. B. Holden*, for the plaintiffs, contra. There was evidence to go to the jury to support the finding that there was a want of proper inspection, and the train was being run at too great a rate of speed. But even if these findings cannot be supported, there is the general finding of negligence. The doctrine of *res ipsa loquitur* applies here. All the plaintiffs had to do was to prove the shipment of the goods, and the loss.

Argument.

The accident in itself was evidence of negligence: *Johnson v. Midland R. W. Co.*, 4 Ex. 367; *Canadian Pacific R. W. Co. v. Chalifoux*, 22 S. C. R. 721; *Skinner v. London and Brighton R. W. Co.*, 5 Ex. 787; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Burke v. Manchester, etc., R. W. Co.*, 22 L. T. N. S. 442; Wood on Railroads (ed. 1894), p. 1196; *Christie v. Griggs*, 2 Camp. 79, 81; Bevan on Negligence, (ed. 1894) 143; Parsons on Railway Liability, 25; *Canfield v. Baltimore, etc., R. W. Co.*, 193 N. Y. 532; *Edgerton v. New York, etc., R. W. Co.*, 39 N. Y. 227; *Mullen v. St. John*, 57 N. Y. 567. Then as to the special contract: the case comes within sec. 246 of the Railway Act, 51 Vict. ch. 29 (D.), and the defendants are, under the circumstances, precluded from setting up the special contract as a bar to the action, negligence having been proved. Then as to the contention as to the section interfering with freedom of contract, the object of the section is to prevent companies doing what this company is attempting to do, namely to contract itself out of liability.

Fullerton, Q.C., for the defendant Thompson, contended there was no liability on his part.

Nesbitt, in reply, referred to *Great Western R. W. Co. v. Baird*, 1 Moo. P. C. N. S. 101, 116; *Dixon v. Richelieu Navigation Co.*, 15 A. R. 647, 18 S. C. R. 704; *Lewis v. Great Western R. W. Co.*, 3 Q. B. D. 195.

July 13th, 1895. MEREDITH, C. J.:—

Two main questions were raised, one as to the liability of the defendants apart from the question of an alleged special contract under the terms of which it was claimed that the glass was shipped; and the other whether, assuming that the defendants would otherwise have been liable for the loss, they were relieved from liability under the terms of the alleged special contract.

I propose dealing with the two questions in the order in which I have mentioned them.

The glass was being carried upon an open flat car, and

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Meredith,
C.J.

in the course of the transit to Toronto, a part of it fell from the car and was destroyed.

The main ground of negligence upon which the plaintiffs relied, was that the glass had been improperly and insufficiently secured upon the car, and that its fall was due to that cause. It was also contended that the defendants were negligent in propelling the train, of which the car formed a part, at too high a rate of speed, especially having regard to the curves of the line, and the rough, defective, and improper condition of the road-bed, and also in not properly inspecting the car at Havelock, one of the divisional points on the line, and the last at which a change of the train hands took place before the train was allowed to proceed on its way to Toronto.

The defendants, on the other hand, contended that the glass was properly and sufficiently secured, and endeavoured to account for what had happened by shewing that at the time the train carrying the glass passed the place where the broken parts were found lying beside the track and near which it must have fallen from the car a very high wind, amounting to a hurricane, was prevailing which blew at or nearly at right angles to the course in which the train was moving, and which it was suggested must have blown the glass from the car or broken the fastenings by which it was held so as to permit it to fall to the ground.

The evidence as to the condition of the track went no further than to shew that it was somewhat rough, and the existence of two curves in the line just before reaching the point where the glass was found lying beside the track was also established.

The evidence as to the speed of the train shewed that according to the schedule by which it was run, its running time between Locust Hill and Myrtle, a distance of sixteen and a-half miles, was forty-seven minutes, or at the rate of about twenty miles an hour, while on the night of the accident it ran that distance in thirty-three minutes, or at the rate of about thirty miles an hour.

It was also shewn that a change of the employees in charge of the train was made at Havelock, at which point some inspection of it should have taken place, but what the nature or purpose of that inspection was, was not very clearly shewn, nor was it shewn whether the inspection had taken place on the night in question, although there was some evidence from which it might be inferred that the usual inspection had not been made.

[The learned Chief Justice then set out the questions submitted to the jury, with the answers, and proceeded.]

I am of opinion that the findings of the jury are not supported by the evidence, and that the judgment entered for the plaintiffs should be set aside and a new trial had between the parties.

It must be taken from the jury's findings that they have negatived the main ground upon which the plaintiffs based their charge of negligence, namely, the improper and insufficient loading of the glass upon the car. The finding that the rate of speed at which the train was run was an act of negligence, and that it, with the other alleged act of negligence led to the loss of the glass, rests, as it appears to me, upon mere conjecture, and there was, in my opinion, no evidence whatever to warrant it.

It is quite true that the rate at which the train was being run, was greater than that allowed by the schedule, but there was nothing to shew that the actual rate of speed was in itself, or having regard to the formation of the line and the condition of the track or road bed, excessive or dangerous, or that it was calculated to endanger the train or the goods being carried by it, or to render more likely to happen, such an accident as led to the loss of the glass. It was incumbent on the plaintiffs to shew this, but not only was it not shewn, but such evidence as there was on the subject, pointed rather to an opposite conclusion as being the proper one. I am at a loss to understand—assuming that the train was proceeding at too high a rate of speed—how that can be said to have led to the loss of the glass. There was certainly no evidence

Judgment.

Meredith,
C.J.

Judgment. that it did. I could have understood that there might
Meredith, have been some connection between the excessive rate of
C.J. speed and the loss of the glass if the train had run off the track and the injury had happened in that way, but here the train proceeded safely to its destination.

It was said that the train had just before coming to the place where the glass was thrown from the car, come down a rather steep grade and ascended another which began only a short distance from the foot of the descending one, and it was suggested that the accident may have been caused by the brakes having been put on suddenly at the foot of the grade, and a consequent sudden coming together of the cars forming the train, but there was no evidence whatever of this having taken place; and a different course was suggested on the other side as being the usual and most likely one to have been taken, that is, that instead of the brakes being put on, a greater head of steam would have been employed so as to enable the train to climb the ascent. A similar observation applies to the suggestion as to the curves. This finding of the jury appears therefore to have been based on mere conjecture, and not to be that which alone would support it—a reasonable inference drawn from the facts given in evidence.

Still less is the finding that the loss of the goods was due in whole or in part to the improper inspection at the last place of inspection, warranted by the evidence. It is difficult to understand what led to this finding—assuming that there was some evidence that the usual inspection did not take place at the point referred to (Havelock), how is that connected with the loss of the glass? The accident happened after the train had left Havelock, and because, as the plaintiffs contended, of the high rate of speed at which it was run. How then could any inspection at Havelock have prevented the accident? It could only be upon the supposition that the fastenings which held the glass in place on the car had become detached or loosened before reaching Havelock, of which there is not a tittle of evidence

It seems to me, therefore, impossible that these findings or the judgments entered upon them can be allowed to stand.

Judgment.
Meredith,
C.J.

Mr. Thomson urged very strongly that even if the finding of the jury as to the particular acts of negligence of which they say the defendants were guilty, cannot be sustained upon the evidence, there is still the finding of negligence generally, and that as the case is one, as he contends, in which the maxim *res ipsa loquitur* applies, the plaintiffs are entitled to hold the judgment upon that finding; but it is, I think, manifest that that is not so. The finding of the jury amounts to no more than this, that the defendants were guilty of the acts and omissions mentioned in their answer to the second question, and that these were in their view negligence on the part of the defendants which led to the loss of the glass, and it cannot be said that the jury, had they reached the conclusion to which I have come—that these were not shewn to be the cause of the loss and so eliminated them from the enquiry—might not have found that, as the defendants contended, the loss was caused, not by the negligence of the defendants but by the storm.

The case is not, however, one in which the Court ought to or indeed can exercise the power of directing judgment to be entered for the defendants. That course should be taken only in a very clear case, and it cannot, I think, be said that there was no evidence upon which the jury might not find in favour of the plaintiffs though not upon the grounds or for the reasons adopted.

There remains to be considered the question whether under the alleged special contract the defendants are relieved from all liability for the loss of the glass, even though it was occasioned by their negligence or that of their servants.

It appears that at the time of the shipping of the glass an instrument in the following form was signed by the plaintiffs' agent, and that the glass was received by the company's agents after it had been signed.

Judgment.

Meredith,
C.J.

" Canadian Pacific Railway Company.

" Contract for carriage and delivery of plate glass.

" To agent Montreal Station, Montreal, 30th May, 1890.

" In consideration of the Canadian Pacific Railway Company receiving for transportation the undermentioned property at reduced rate hereinafter mentioned, which it is hereby admitted is a reduced rate and less than the regular and lawful rates charged by said company for the transportation of such property from Montreal to Toronto, the same being consigned to Cobban Manufacturing Company and marked Ex. S. S. Sarnia, 21 cases C. M. Co., 95-115. (Via) of"

" We hereby agree with the Canadian Pacific Railway Company, and all other connecting carriers over whose lines or on whose vessels or vehicles said goods may have to pass or be carried on their way to destination, that the said Canadian Pacific Railway Company, and such other carriers, shall not, nor shall any of them, be responsible for any loss, injury or damage of any kind which may occur to the said property, no matter how or by what means, including negligence caused in loading, unloading, or during or in transportation."

* * * * *

" And we hereby promise and agree to save harmless the Canadian Pacific Railway Company and all other railways or other carriers connecting with the said company, and protect them of and from all claims which may arise in case of loss, injury to or damage of any kind which may happen to the said property, no matter how or by whose negligence or by what means caused as aforesaid. * *

" The Canadian Pacific Railway Company are in no way to be responsible for any damage or injury to the said property while in the custody of any carters receiving from them or delivering to them property at any of their stations.

" (Sgd.) B. & S. H. THOMPSON & Co., shippers.

" p. C. A. SAUNDERSON."

The defendant company had two rates for the carriage of

plate glass from Montreal to Toronto—one of twenty-three cents per 100 pounds where the goods were carried at owner's risk and an instrument in form similar to that signed by the plaintiffs' agent in this case was executed, and the other of sixty cents per 100 pounds where the goods were not at owner's risk and no such instrument was executed.

It was proved that the plaintiffs were aware of the two rates, and assented to the terms on which the lower one was granted, believing that the provision absolving the defendant company from liability for negligence was not binding upon them.

It was also proved that a Canadian joint freight classification, which was adopted by the defendant company in addition to many other railway companies, was approved by Order in Council on the 16th day of November, 1889. In this classification appears the following:—

L. C. L. C. L.

- "Glass, plate or mirrors, requiring the use of
a flat or gondola car for carriage—
- "One case minimum weight 12,000 pounds. . . D. 1.
- "Two or more cases, minimum weight 20,000
pounds D. 1.
- "Same—when shipped at owner's risk, ship-
pers signing special plate glass release form.
- "One case minimum weight 12,000 pounds. . . 3
- "Two or more cases, minimum weight 20,000
pounds 3

The letter and figure "D. 1" mean double first class, and the figure "3" third class; but there is nothing in the classification itself, or the Order in Council approving of it, to indicate what was meant by the words "shippers signing special plate glass release form," nor is the form of the release referred to given. Double first class is shewn to be, according to the company's rates at the time the shipment in question was made, sixty cents, and third class twenty-three cents per 100 pounds for the distance from Montreal to Toronto.

Judgment.

Meredith,
C.J.

Judgment.
Meredith,
C.J.

It must, I think, also be taken to be established that the rate paid for the transportation of the goods in question was the rate charged by the company for third class freight and no more, and that the plaintiffs knew that according to the course of business of the company they could have their goods carried at the higher rate without signing the instrument which was signed, or at the lower rate if they signed it, and that knowing this they elected to deal on the basis of the lower rate, but believing that the conditions were not, so far as they purported to relieve the defendant company from the consequences of negligence, binding upon them, and that the company's agents also knew that they were taking that position.

The question presented for determination upon this state of facts is whether the provisions of sec. 246 of the Railway Act 51 Vic. ch. 29 (D.), are applicable to the dealing between the plaintiffs and the defendants so as to prevent the defendants from being relieved from liability for damage happening to the glass during its transportation arising from the negligence or omission of the company or of its servants?

The contention of the defendants is that there is nothing in the Act to prevent them entering into a contract with a customer by which they may be relieved from such liability in consideration of a less rate than the maximum one allowed by the company's by-law fixing the tolls to be levied and taken by it, after it has been approved of by the Governor in Council under section 227 being charged to the customer, he agreeing on that account to relieve them from that liability, and that it is only when the goods are received to be carried for the maximum toll allowed by the by-law in the particular case that the statutory liability attaches.

This contention, it appears to me, is not well founded; and I am also of opinion that, even if the proper construction of the Act is that contended for upon the facts appearing in this case, the defendants are not entitled to rely upon the special contract to relieve them from liability for acts of negligence.

Section 226 provides that the company in fixing or regulating the tolls to be demanded and taken for the transportation of goods shall, except in respect to through traffic to or from the United States, adopt or conform to any uniform classification of freight which the Governor in Council on the report of the Minister from time to time prescribes.

Judgment.
Meredith,
C.J.

What then is involved in the term "classification of freight"? It cannot, I venture to think, have been intended to enable the company, even under the sanction of an Order in Council to free itself from the obligation imposed by section 246; and, assuming that it gives to the company power to fix a toll having regard to the risk which it assumes, it cannot, I take it, authorize the excluding from that risk what the company is forbidden by section 246 to contract itself out of liability for.

How, then, adopting this view, must the classification and by-law be taken to affect the question at issue in this case? It seems to me that the only way in which it can be treated is as making the company's undertaking, one to carry the goods in question at owner's risk at the rate of twenty-three cents per 100 pounds, owner's risk not including risks arising from the negligence of the company or its servants; and that the other words of the classification must be rejected as *ultra vires*, and so treating it even upon the reading of section 246, according to the defendants' contention the stipulation purporting to release the defendants from liability for negligence must be eliminated, the toll lawfully payable being the twenty-three cents per 100 pounds, the owner assuming all the risks of transportation, except those arising from the negligence of the defendants or their servants.

It is also to be observed, as I have already pointed out, that the form and nature of the release are not mentioned, and it may well be that what was meant was such a release as the company was permitted to take, *i.e.*, a release absolving it from all risks except those arising from negligence.

Judgment.
Meredith,
C.J.

If this view be thought to savour too much of refinement, I still see no escape for the defendants. The classification is their act though it is subject to the approval of the Governor in Council. They propose by it to receive plate glass to be carried as third class freight where it is taken at owner's risk, and the shipper signs the special release form, which, I will assume, means such a form as was signed by the plaintiffs in this case, and the Governor in Council, as far as he has authority to do so, sanctions this. This sanction can operate, and is given *quantum valeat*, and we have then in this case a special contract entered into by the shipper containing these qualifications or limitations of the company's liability; but when the legal effect of that contract has to be determined, the Court is, as it seems to me, bound to declare its provisions so far as they exclude liability for the consequences of negligence to be nugatory, or in other words, to treat the contract as if they were not contained in it.

If I am right in this view, it is sufficient to dispose of the point I am dealing with adversely to the defendants' contention.

But granting that I am wrong in my view, it appears to me that the defendants' contention must nevertheless fail.

The case of *Vogel v. Grand Trunk R. W. Co.*, 11 S. C. R. 612, has settled the law to be that in the cases, whatever they may be, to which section 246 applies, it prevents the company relieving itself by special contract from liability for damage arising from negligence. The question then turns in this case upon the meaning of the words "On the due payment of the toll, freight or fare lawfully payable therefor;" and were the construction contended for by the defendants to be adopted, it would mean that however unfair or unjust the special contract might be so long as the company did not charge the maximum rate of toll fixed by the by-law, after it had received the approval of the Governor in Council under section 227, the transaction would be outside the statute altogether. Such a construction would, it appears to me, entirely defeat

the object which the statute was designed to accomplish and leave persons dealing with a railway company to all intents and purposes, in the same position in which they were before the Act was passed, and which led to expressions of opinion by many Judges in favour of a change in the law and to Parliament, influenced doubtless by their observations, making those changes which are embodied in section 246, and we ought not, I think, to adopt such a construction unless the language of the section imperatively demands it, and that, I think, it does not. The fair meaning of the words, which I have quoted, appears to me to be that upon payment of such toll, freight or fare, within the maximum rate fixed by the by-law as the company may choose to accept, and which in that case is "the toll, freight or fare, lawfully payable therefor," the statutory liability is to apply.

Judgment.
Meredith,
C.J.

The Court is bound in construing this, as all other statutes, to give to them "such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of such provision or enactment, according to its true intent, meaning and spirit": R. S. C. ch. 1, sec. 7 (56).

I venture respectfully to say that reference to the cases decided under the English Acts, is, in my opinion, calculated to render more difficult rather than to simplify the work of interpreting the provisions of our Act. The policy of the English Act is to allow special contracts to be made, limiting the liability which would otherwise attach to the carrier, provided the terms of the special contract are just and reasonable as to which the Courts have to pass, while that of our Act is to forbid the making of contracts relieving the carrier from liability for negligence, and does not permit him to vary or lessen his statutory liability by special contract, even though the terms of it might be such that if the Court had power to pass upon that question, it would deem to be just and reasonable.

I am not impressed by the argument that such legisla-

Judgment.

Meredith,
C.J.

tion as that in question interferes with freedom of contract, and ought, therefore, to be strictly construed. The corporations with which the Act deals, are the creatures of the Legislature, and are entitled to exercise only such powers and to possess such rights as Parliament may in its wisdom endow them with; and it must be borne in mind that while they exist partly for the benefit of the shareholders, they are intended to perform important duties towards the public in return for which they receive valuable privileges; and it may, I think, well be said that it is in the highest degree important and perhaps necessary to the efficient discharge of those duties that corporations entrusted with such powers ought not, on grounds of public policy, to be permitted to so contract that their operations may be carried on without any liability attaching to them for negligence in the performance of their duties. I may be permitted to add that, in my judgment, giving to the Act in question the construction which I think ought to be given to it, is not calculated to interfere with freedom of contract, but rather to put the shipper, who is to a great extent at the mercy of the carrier by rail, the latter having, as he has in a large measure, a monopoly in his particular business, in a position in some degree of equality with the carrier, and to enable the parties to stand in such relation to one another that there may be real freedom of contract on both sides.

I fully recognize that it is the province of the Court to ascertain the mind of the Legislature from the language, of its enactments, and not, under the guise of interpreting to legislate, but it is likewise the duty of the Court to expound, and not by conjuring up doubts and difficulties, to practically repeal what has been enacted.

I have thus far dealt with the case apart from authority except so far as the *Vogel* case is admittedly an authority, as it must be conceded to be, for the proposition that the word "condition" in section 246 includes a special contract; but I think that case involved also a decision of the question which we have to deal with. There the rate

charged for the carriage of the horses was less than the ordinary rate authorized by Order in Council, and the point now raised was distinctly taken in argument by counsel for the railway company, and was relied on by them in the reasons for the appeal to the Court of Appeal, and in the factum in the Supreme Court.

Judgment.
Meredith,
C.J.

In *Robertson v. Grand Trunk R. W. Co.*, 21 A. R. 204, the question was much discussed, and opinions were expressed by two at least of the Judges who took part in that decision which indicate that their views of the effect of the statute as applied to the facts of such a case as this accord with those which I have endeavoured to express.

In that case the horse was shipped under a special contract and at a rate less than the ordinary one which the defendants were authorized to charge, and by the special contract they sought to relieve themselves, not wholly but in part, from liability for loss arising from negligence.

If, in the view of the Court of Appeal, the defendants were not subject to the statutory liability where they agree to carry at a less rate than the ordinary one in consideration of the shipper assuming the risks of the carriage of the goods, including those arising from negligence, that would at once have put an end to the question, and the case must have been decided in their favour; and it is difficult to see why the decision was rested upon the ground that, though the defendants were not at liberty to contract themselves out of all liability, they might lawfully stipulate that in case of loss the amount of the compensation to be paid should be limited to a named amount even though the loss were occasioned by negligence, or why one of the learned Judges based his decision upon the ground that the plaintiff having represented the value of the horse to be not more than \$100, was estopped from asserting the contrary.

The views expressed in the *Robertson* case which I have referred to as supporting my own conclusions are found in the judgment of the Chancellor, at page 212, where he says: "The Canadian Act strikes at this" (*i.e.*, the stipula-

Judgment. tion relieving from liability in case of loss occasioned by
Meredith, negligence) "lest the public be coerced by a practical
C.J. monopoly (see *Manchester, etc. R. W. Co. v. Brown*, 8 App.
Cas., at p. 712), in other words, the attempt is made without legislative power to introduce an owner's risk at reduced rate as the standard, so as to relieve the company from their full risk, which as carriers they would be subjected to by collecting the ordinary or proper rate. Apart from what has been said, it appears to me that the whole scheme of the Canadian Act is repugnant to this method."

Also in the judgment of Osler, J. A., at p. 215, where the matter is dealt with in this way: "But whether they receive goods as common carriers or merely as bailees for hire, the 3rd sub-section of section 246, equally prohibits them from contracting themselves out of liability to an action for a loss occasioned by their negligence, though there is nothing now, more than there was before this Act, to prevent them from limiting by any form of special contract their common carriers' liability as insurers of the goods delivered to them for carriage, and this is what they do as to animals of ordinary value by the terms of the classification the expression 'owner's risk' excluding that liability, and leaving them liable for negligence only, while the effect of the adoption of the alternative or higher rate, as provided by condition 7 of the classification, is to give the shipper the benefit of the ordinary carriers' liability as insurers. There is nothing in section 226 which enables the Governor in Council to relieve the company from the liability for negligence imposed by section 246, sub-section 3, and therefore the expression 'owner's risk' attached to certain classes of goods in the freight classification must receive the more limited interpretation and cannot extend to the risk of loss by the carrier's negligence."

I refer also to the language of Maclellan, J. A., at page 223, speaking of the provisions of the classification schedule as to race horses and other valuable animals, which provide that they are to be carried at owner's risk of loss

or damage arising from any cause whatever, he says: "There may be difficulty in reconciling this part of the classification with the clause of the Act forbidding conditions relieving the company from actions for negligence." And again, at page 224, where he makes these observations: "It is true that there was another alternative mentioned in the classification, namely, that if the horse was to be treated as a race horse, it would be carried at the ordinary rate at 'owner's risk of loss and damage from any cause whatever,' but as that stipulation is contrary to the statute, it need not be regarded."

Judgment.
Meredith,
C.J.

I refer also to the language of the same learned Judge, at pp. 222-3.

It seems to me, therefore, that both upon principle and authority, the defendants' contention on this branch of the case fails.

In my opinion the findings of the jury and the judgment entered upon them, should be set aside and a new trial had between the parties, and the costs of the last trial and of this motion, should be costs in the cause to the successful party.

I do not desire to express any opinion as to the course open to the plaintiffs on another trial to establish the liability of the defendants for negligence.

ROSE, J.:—

The argument of the defendants' counsel, as I understand it, is that the company under the statute and orders in council was empowered to charge as freight for the carriage of the goods in question, sixty-six cents per 100 pounds as a maximum sum, and that such freight was the sum lawfully payable under sub-sec. 2, sec. 246 of the Railway Act of 1888: that, if such sum had been paid, the company would have been liable for any damages arising from any neglect or refusal to take, transport, or discharge such goods, including damages arising from any neglect or omission of the company or its servants: that such sum

Judgment.

Rose, J.

was not paid by the plaintiffs, but a less sum, described in the contract entered into between the parties as "a reduced rate and less than the regular or lawful rates charged by the company for the transportation of such property from Montreal to Toronto:" that in consideration of the company agreeing to take, transport and discharge at such reduced rates, the plaintiff agreed that such company should not be responsible for damage arising from negligence; and that such a contract was not forbidden by the statute 51 Vict. sub-section 3 of section 246 (D.), the freight paid not being that "lawfully payable:" that the goods having been received under such a contract, there was no liability for the loss whatever happened, and so the judgment should be entered for the defendant company.

Two questions arise: First, does the evidence disclose such a state of facts as afford a foundation for the argument? Second, if so, is the defendant's proposition sustainable in law?

On the 14th of March, 1885, the Ontario and Quebec Railway Company passed a by-law fixing tolls as provided by the Railway Act, R. S. C. ch. 109, sec. 16. This by-law, No. 31, may be found in the Statutes of Canada, 1885, p. CXLV. By its provisions the maximum mileage tariff of freight rates and tolls for distances over 325, and not over 350 miles, was fixed at sixty-six cents per 100 pounds for first class, fifty cents for third class, and thirty-three cents for fifth class. See also Canada Gazette, Vol. XVIII., p. 1893. The defendant company was at the date of the contract in question, lessee of the Ontario and Quebec Railway Company.

On the 16th of November, 1889, the Governor in Council prescribed a freight classification pursuant to 51 Vict. ch. 29, sec. 226 (D.): see Canada Gazette, 1889, July to December, p. 1116. The first schedule being

"Canadian Joint Freight Classification No. 6, dated 15th April, 1889, together with special regulations and conditions, printed on the three preceding pages."

I make the following extract, the letters "L. C. L."

meaning less than car-load; "C. L." car-load; "D. 1." Judgment.
double first class; "3" third class. Rose, J.

L. C. L. C. L.

"Glass, plate or mirrors, requiring the use of
a flat or gondola car for carriage—

"One case minimum weight 12,000 pounds.. D. 1.

"Two more cases minimum weight 20,000
pounds D. 1.

"Same—when shipped at owner's risk, ship-
pers signing special plate glass release
form—

"One case minimum weight 12,000 pounds.. 3

"Two or more cases minimum weight 20,000
pounds 3

"Plate glass not in box cars, to be loaded and
unloaded by owners.

Signs O. R. released D. 1."

The eighth special regulation and condition is as follows :

"8. All articles marked at O. R. in this classification,
must be receipted for by shippers, and the words owner's
risk, written in full on the shipping notes and receipts.
Articles marked released must also be so receipted for, and
shippers or owners must duly execute a release in duplicate
on the company's forms. Provided, however, that in cases
where the shippers decline to accept such receipts endorsed
"owner's risk," or to sign such releases, the goods may be
received for shipment on ordinary shipping notes and
receipts without above endorsement at fifty per cent. in
addition to the rates which would be charged if shipped
at owner's risk, ^{and} released with the exception of plate
^{or} glass, which will be at double the rates which would be
charged if shipped at O. R. released."

The car carrying the glass that is in question herein,
was, I believe, No. 1895, and on it were seven packages
having a weight of 25,200 pounds.

It will be observed that in the classification above set
out, no one of the articles except the last is marked "O. R."
or "released."

Judgment.

Rose, J.

Reference to the classification as given in full, will shew many articles marked "O. R.," and also many "O. R. released." It may be that clause eight was not intended to apply to such a shipment as the one in question, but that the classification above governs it. Support is given to this suggestion by the want of harmony between the provisions in clause eight, that if no release is given, the shippers may charge "double the rates, which would be charged if shipped O. R. released," and that in the classification enabling the shipper to charge double first class rates.

The receipt produced by the plaintiffs has "owner's risk" written in full; but this does not appear on the shipping note, nor on any one of the way bills, put in. The way bill has not "owner's risk" written on it, but has the word "released," which word does not appear on either the receipt or the other way bills.

Mr. Bosworth, in his evidence before us* on the 12th of January, 1895, stated that the defendant company acted on the classification, treating clause eight as in conflict, if it was intended to apply to such a shipment, and feeling bound by the special provision in the classification rather than the general one in clause eight.

Mr. Bosworth explained that the rates between Toronto and Montreal were revised twice a year, and that the company fixed their rates at what seemed expedient, not exceeding the maximum fixed by by-law No. 31: that for such shipments as the one in question, the company fixed fifth class rates at fifteen cents per 100 pounds; third class, fifty per cent. higher, *i.e.*, twenty-three cents, and first class 100 per cent. higher, *i.e.*, thirty cents; therefore double first class would be sixty cents, which would be well within the tariff, the rates in the tariff being, as I have stated, 5th, thirty-three; 3rd, fifty; and 1st, sixty-six cents. This is shewn by the rate sheet of 5th of May, 1890.

The plaintiffs knew all about the freight rates, and that unless they signed the release form, which they did, they would have to pay double the first class rate shewn by

*Evidence taken before the Divisional Court by special leave of that Court.

the special freight tariff, *i.e.*, sixty cents. They knew that by signing the release they could get their goods carried at twenty-three cents; but they thought that the release "was not worth the paper it was written upon," and so they signed it, thus obtaining the benefit of the lower rate.

Judgment.

Rose, J.

The same witness admitted receiving a circular advising shippers of the option, and stating if they did not wish to execute the release form or take advantage of the arrangement which would place the glass in the third class, they might have it carried at double first class rate.

The release form signed by the plaintiffs' agent was the only one in use in September, 1888. It is as follows:—

[The learned Judge then set out the special contract, *vide* p. 740.]

It will be observed that the plaintiffs by such release admit that the twenty-three cents was a reduced rate and less than the regular and lawful rates charged by the defendant company for the transportation of such property from Montreal to Toronto.

Therefore, unless the statute prohibits the company from entering into such a contract or obtaining the benefit of such a release the plaintiffs cannot recover.

I think I must treat clause eight as not applying, and deal with the classification alone. If it was intended to apply, the plaintiffs had not given to them by the company the option of having their goods carried at "double the rates which would be charged if shipped at O. R. released" *i.e.*, at forty-six cents.

The by-law fixing rates makes a division into ten classes, numbers one, two, etc.

It does not name any class as D. 1. This is found alone in the classification. The statute, section 226, requires the company in fixing or regulating the tolls to be demanded to adopt and conform to any uniform classification of freight which the Governor in Council on the report of the Minister from time to time prescribes. No by-law fixing the tolls has been approved of by the Governor in Council since by-law 31 in 1885. When, therefore, we find in the classification of 1889 that glass plate or mirrors requiring

Judgment. the use of a flat or gondola car for carriage is classified D.
Rose, J. 1, *i.e.*, double first class, if that is to be read as authorizing a charge for such articles of double first class rates, *i.e.*, double sixty-six cents—\$1.32, it would seem to be without warrant. The statute provides by section 223 that tolls may be fixed or regulated by by-law; by section 227 that the by-law must be approved by the Governor in Council; and by section 228 that every by-law fixing and regulating tolls shall be subject to revision by the Governor in Council from time to time after approval thereof.

The order in council of the 16th of November, 1889, does not purport to deal with tolls, but declares that it is passed under the provisions of section 226 to prescribe a uniform classification of freight as the basis for tolls. We find in the order a clause explaining terms and characters used, in which it is said that "the number of the class is given opposite each article." 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, stand for first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth classes respectively. $1\frac{1}{2}$ stand for one and a half first class; D-1 for double first class; 3-1 for three times first class; 4-1 for four times first class, etc. It is therefore either an authorization to charge double first class rates, or, if it makes D-1 an additional class, then the by-law fixing tolls has provided no toll or rate for articles in such a class. This the more clearly appears when we observe that the classification one to ten in the by-law of 1885 fixing tolls, is adopted by the order in council of 1889, and the other classes are added.

Section 227 forbids the levying or taking of tolls except under a by-law approved by the Governor in Council; and also forbids the levying or collecting of any money for services as a common carrier except subject to the provisions of the Act.

Does it not, therefore, follow that as under section 226, the company must, in fixing and regulating tolls, adopt and conform to any uniform classification of freight prescribed by the Governor in Council, and as the only by-law in force fixes no toll for any articles classed as D-1,

then that for articles so classed, neither toll nor money for services as a common carrier can be levied, taken, or collected. So that whether we read the order in council as authorizing the taking of double first class rate for such articles and so as to such provision *ultra vires*, or read it as establishing a class not named in the by-law fixing tolls, and so that for such class no toll has been fixed, must it not be that for such articles so classified, there has been fixed no toll, freight, or fare lawfully payable within the meaning of section 246?

Judgment.

Rose, J.

The next provision in the classification places the same articles in the third class when shipped at owner's risk, and the shippers sign a special plate glass release form. How are we to read this? Have the shippers no option? Must they ship at owner's risk and sign the release, or be at the mercy of the company as to whether the goods will be carried at all, no other toll or freight having been fixed for such articles?

If we should consider the preceding classification of the same articles as placing them in class one, authorizing the charging of double first class rate,—which I do not think we can do,—then, read with the provisions as to owner's risk and the release clause, it would come to this, that the order in council of 1889 fixes a penalty for not sending goods in class three at owner's risk and signing a release, the penalty being double the first class rate, *i.e.*, double sixty-six cents, and that would, as it seems to me, to be clearly *ultra vires*. If we should read the provision placing these articles in the third class and annexing a condition that the shipper must send at owner's risk and sign a release, then are we at liberty to hold that the third class rate is the rate lawfully payable, and reject the condition as *ultra vires*?

Is what has been done in the order in council of 1889 classification of goods at all, is it not rather an attempt to fix rates with reference to whether the goods are carried at the owner's risk or the company's risk? If it is not properly a classification, then, as far as appears, there is no

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classification by the company to which the tolls fixed by the by-law can apply.

If these articles are to be considered as having been placed in class D. 1 without any toll fixed for such class, would not the company have been bound to accept such goods if tendered to it as a common carrier, and to carry them without the payment of any toll or freight, and should not section 246 be so liberally construed as to cover such a case, the company having by its own default put it out of its power to levy or take any toll, or to levy or collect any money as common carriers?

Whether we regard the provision placing such articles in the third class as effectively placing them in such class, but as also containing a provision requiring a release to be executed, or as requiring the execution of a release to have them placed in the third class, it seems to me, having regard to what I have said as to D. 1, the provision requiring a release is *ultra vires*.

The company dealing with the plaintiffs by its circular of the 21st November, 1888, required them either to pay double first class rate, or to execute the release in question; that is, as it reads, either to pay \$1.32, or to execute the release. Subsequently, it is true, that the plaintiffs were informed by the company that thirty cents was fixed as the first class rate, and therefore sixty cents would be double first class; but this, as it seems to me, does not do away with any of the difficulties of construction above suggested.

Assuming, however, that the Governor in Council had authority to place the articles in question in the third class when carried at owner's risk, and the shippers signed a special glass release form, and that we do not find that such articles were placed in any other class, then what release form is meant?

It must be either one without any release from liability for damage from negligence, or one with such a release.

If with a release, then, in my opinion, it was *ultra vires* as contrary to the provisions of section 246, for the com-

pany was bound to carry upon payment of the freight lawfully payable ; and if the third class rate was the only sum named, then it was the rate lawfully payable, and the provisions of sub-section 2 applied to prevent the company being released from such liability. But if the order in council meant a release from all liability for damage other than from negligence, then the release in question was not such a release and cannot prevail as to so much as purports to release from liability for damage from negligence.

By section 246, the company was bound to furnish sufficient accommodation for transportation of goods, and to take transport and discharge the same on payment of the toll, freight, or fare lawfully payable, and was prevented from contracting itself out of liability for damage arising from negligence in the premises.

By the sections referred to, no toll, freight or fare, could be taken except such as was fixed by by-law approved by the Governor in Council.

If the company refused or neglected to pass a by-law fixing tolls, could it refuse to take transport or discharge goods ? If not, then would not the provisions as to liability for damage from negligence still apply ?

If it could refuse to carry, notwithstanding such section, then could it refuse as a common carrier ? If it could not refuse to receive and carry as a common carrier, then would a contract to carry, as here, for twenty-three cents with an absolute release be valid ?

Section 227 forbids levying or collecting money for services as a common carrier except subject to the provisions of the Act, and would not such a contract to carry for any named sum be in contravention of such provisions. If it was bound to receive and carry as a common carrier, it was by virtue of such section bound to do so without reward, no toll having been paid, and so there would be no consideration either for the promise to pay the twenty-three cents or for the release. And would not such absence of consideration exist if the company was bound to carry under the provisions of section 246 ?

Judgment.

Rose, J.

Judgment.

Rose, J.

In fine, if D. 1 is a class added to classes 1-10, then no toll has been fixed for such class. If it is not a class but merely a provision authorizing the demand of double the first class rate fixed by the by-law, it is *ultra vires*. If, taken in connection with what follows, it is a provision requiring the payment of double the first class rate unless a release is signed, then it imposes a penalty for not signing such release, and is *ultra vires*.

If any one of the above three propositions is correct, then only one rate is fixed on plate glass carried on flat or gondola cars, *i. e.*, a third class rate. If only one rate is fixed, then a condition requiring the shipper to sign a release to enable him to have such glass carried at a third class rate is *ultra vires*, and the plaintiffs were entitled to have the glass carried without signing a release; or, if the provision is one imposing a condition to be performed to enable the shipper to have the goods placed in the third class, then it was *ultra vires*, and the goods were not classified as third class.

If the goods were classified as D. 1, but no toll was fixed for such class, or were not classified at all, then no toll, freight or fare, was lawfully payable, and none could be collected whether the goods were carried by the company under the statute or as common carriers. If the company was bound to take, transport and discharge such goods under section 246, notwithstanding that no toll was lawfully payable, then liability for damage from negligence would remain; and so, also, if not bound under the statute but bound as a common carrier, there would be no consideration for any promise to pay toll or for signing the release.

If the provision in the classification as to signing a release is *ultra vires*, then the release is such a one as would violate the provision of section 246, the toll payable being that lawfully payable, and the clause releasing from liability for negligence would not be invalid.

If the case here had been a rate lawfully payable, *i. e.*, any fixed sum not exceeding the maximum fixed by the

by-law of 1885, and the company had given the shipper an option of paying such sum, the company being liable as provided by the statute, or of paying a less sum, the shipper assuming all risk, I do not see any legal difficulty in the way of such an agreement, for the company being only bound to carry on payment of the sum lawfully payable, and the shipper choosing to agree to accept all risk in consideration of the carriage at the smaller sum, the provisions of section 246 would not apply. In an action against the company for neglect or refusal in the premises under section 246, it would, in my opinion, be necessary to aver tender or payment of the sum lawfully payable, otherwise no cause of action would be shewn.

Judgment.

Rose, J.

If I am correct in this view, the classification should not refer at all to carrying goods under a release, or make such an act a ground of classification.

I concur in the opinion of the learned Chief Justice that there should be a new trial, and for the reasons stated by him. If there should be a new trial, I say nothing as to the course proper to be pursued by the plaintiffs in placing their case before the Court.

MACMAHON, J.:—

The liability of a common carrier of goods is to be found in what eminent jurists have called the great judgment of Holt, C. J., in *Coggs v. Bernard*, 1 Sm. L. C., 8th ed., p. 213. where it is thus stated: "A delivery to carry, or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc.: which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Mors v. Slue*, Raym. 220. 1 Vent. 190, 238. The law charges this person thus entrusted to carry goods, against all events, but acts of God, and of the

Judgment. enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable.”

MacMahon,
J.

In the case of an ordinary bill of lading where the goods are damaged or lost, the old form of pleading was, as pointed out by Lord Esher, M. R., in *The Glendarroch* (1894), P. D. 226, at p. 231. The declaration stated the bill of lading, and relying on the first and substantive part of the bill of lading, alleged non-delivery. Strictly speaking, the declaration could not properly have stated anything about negligence, “because negligence was immaterial.”

The plaintiffs’ case at the trial is, therefore, complete when he has proved the contract to carry, and the non-delivery of the goods. The presumption of negligence on the part of the carrier arises from non-delivery. This presumption is thus stated in Taylor on Evidence, sec. 187: “One or two presumptions may here be mentioned, which attach to particular trades, and which, though apparently harsh, are in reality founded on just principles of public policy. For instance, if goods intrusted to a common carrier be lost or damaged, the law will conclusively presume that the carrier has been guilty of negligence, unless he can shew that the loss or damage was occasioned by what is technically called the act of God, or by the Queen’s enemies.” And in section 256 the author says: “In an action had against a common carrier for the loss of property entrusted to him, negligence, though averred, need not be proved.”

Negligence being presumed from the loss or destruction of the goods, the plaintiffs were not called upon to shew, as they endeavoured to do, the particular kind of negligence of which the railway company was guilty, conducing to, or causing the destruction of the goods. Under the statement of claim in this case the plaintiffs might (as said by Parke, B., in *Wyld v. Pickford*, 8 M. & W., at p. 459), “recover for any species of loss by neglect: and, according to the decision of the Court of Queen’s Bench, in the case of *Pozzi v. Shipton*, 8 Ad. & E. 963, for any species of loss for which a common carrier would be responsible.”

The plaintiffs assumed at the trial that the onus of ^{Judgment.} proving a loss through negligence of the railway company ^{MacMahon,} rested on them, whereas no onus whatever as to that was ^{J.} cast upon them.

This question was not even mooted when the case was before this Division after the first trial, and therefore was not dealt with in the judgment then delivered.

The other question for our decision on this appeal is clearly stated in the judgment of my learned brother Rose.

The point raised in the present case is different from the one upon which the decision in *Robertson v. Grand Trunk R. W. Co.*, 24 O. R. 75, and 21 A. R. 204, turned. The decision in that case was based on the estoppel created by the plaintiff having, in the contract for the transportation of his horse, which was signed by him, valued the animal at \$100, and the horse having been killed through the negligence of the railway, it was held he was not entitled to recover a greater sum than the value placed upon it in the contract—the freight demanded and paid being upon the basis of such value.

Parliament has provided by the Railway Act, 51 Vict. ch. 29, (D.), (secs. 226 & 227) for the classification of freight to be transported by railways, and also for the fixing of tolls to be levied therefor. And when the Governor in Council has prescribed a uniform classification of freight and has approved of the by-law fixing the toll to be taken for the transportation of the different classes of goods, these become "the tolls or freight lawfully payable therefor" by section 246, and such toll or freight must be paid or tendered before transportation can be demanded or required from a railway company.

No greater toll, or rate, can be exacted by a railway company in its character of a common carrier, than what is fixed by by-law and approved by the Order in Council. For section 227 provides "nor shall any company levy or collect any money for services as *common carriers* except subject to the provisions of this Act."

Mr. Justice Rose in his judgment sets out the different

Judgment.
MacMahon,
J.

classifications for plate-glass made by the Order of the Governor in Council of the 16th day of November, 1889, as well as the 8th regulation embodied in said order, and also the by-law passed by the Ontario and Quebec Railway Company, fixing the tolls for the transportation of freight assented to by the Order in Council of the 21st day of May, 1885, none of which need be here repeated.

As, however, the authority conferred on the Governor in Council by section 227 to approve of by-laws fixing the tolls, is clearly limited to approving of tolls to be levied by railway companies as common carriers, and are so established as "the toll or freight lawfully payable" for goods required to be transported by such railways in their character as common carriers by section 246, the mere placing of certain goods in a special class and by the regulation giving an alternative rate for transportation, can only be regarded as a notification to all shippers that instead of paying "the freight lawfully payable" and so holding the company to its liability as a common carrier, they had the option of shipping according to the alternative rate upon releasing the company. So that where the alternative rate was paid, and a contract signed by the shipper, such as was signed in this case, the binding effect thereof was not added to by the 8th resolution of the Governor in Council.

And as by section 246 the railway company is to transport goods "on the due payment of the toll or freight payable therefor," had "the freight lawfully payable" to the railway company under the classification and by-law as to rates approved by Order in Council, for the transportation of plate-glass from Montreal to Toronto in flat cars, been sixty cents per 100 lbs., as was supposed when the contract in question was entered into between the plaintiff and the railway company, and assumed to be the case on the first argument before us, then, if the plaintiffs had the option of shipping at an alternative rate of twenty-three cents per 100 lbs., and did so ship, and sign a contract such as was signed by the plaintiffs in this

case, there is, according to my view, nothing in the statute preventing a railway company from entering into such a contract, as the one in question, releasing the railway from all liability for negligence resulting in the loss of the goods.

Judgment.

MacMahon,
J.

In no case have the provisions of our statute been considered in relation to a special contract releasing the company from liability for negligence, in consideration of the shipper having his goods transported at an alternative rate. But in some of the cases individual members of the judiciary have unhesitatingly expressed the opinion that there is nothing in the language of section 246 prohibiting a railway company from entering into a special contract by which the owner of goods transported releases it from liability for negligence in respect of loss or damage to such goods.

As expressed in *Vogel v. Grand Trunk R. W. Co.*, 11 S. C. R., at p. 628, the opinion of Strong, J., clearly holds that the effect of section 246 does not preclude a railway company from entering into a special contract actually signed by the consignor by which the company is released from its liability for loss occasioned by negligence. Equally explicit is the language of Mr. Justice Taschereau in the same case, at p. 638, who says: "Why should parties desirous of making such contracts be deprived of their common law right to do so? * * Has the Legislature deprived them of that right? It would require express words to bring me to the conclusion that they have done so. I cannot find them in the statutes." See also, the judgment of Burton, J.A., in the *Vogel* case, 10 A. R. 162, at p. 173.

Cameron, C. J., in *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625, at p. 640, speaking of the *Vogel* case, said that "the weight of individual judicial opinion, numerically considered," was "in favour of the right of the company to make the contract." And, speaking for himself, he "inclined to the view that they could, where the contract conferred a benefit or advantage upon the passenger or shipper in the abatement of fare or freight."

Judgment.

MacMahon,
J.

By the uniform classification of freight prescribed by the Order in Council of November, 1889, plate-glass, when carried on flat cars, is classified as double first-class. But the only by-law fixing the tolls or rates for freight is No. 31, approved by the Governor in Council on the 21st day of May, 1885, which makes the highest or first-class rate between Montreal and Toronto sixty-six cents per 100 lbs. But as that by-law makes no provision for the payment of a double first-class rate, therefore what in the uniform classification of 1889 is designated double first-class freight, forms a class of freight for which no rate is provided in the tariff of freights of 1885.

Then as the defendant company in fixing its rates for tolls to be collected by its tariff of the 5th of May, 1890, did not adopt and conform to the uniform classification prescribed by the Order in Council of November, 1889, and as no by-law fixing the rate of tolls in the company's tariff of May, 1890, has been approved by the Governor in Council, it is difficult to see how the railway company can collect any money for services as common carriers, as their right to do so is made dependent on the company's complying with the provisions of section 227 as to the approval by the Governor in Council of the by-law fixing the tolls.

The railway company could not, before transporting the plaintiffs' plate-glass, insist upon being paid sixty cents for 100 lbs., which by the tariff of rates of May, 1890, would be double first-class rates, because no by-law fixing such tolls had been approved of by the Governor in Council, and, until such approval, there could be no "toll, freight or fare, lawfully payable," and, until "the freight lawfully payable," was determined by Order in Council, there could be no alternative rate without which the release would be no protection to the railway company against loss.

The loss having been admitted, and no evidence having been given by the railway company that it resulted from the act of God or the Queen's enemies, I think judgment should be entered for the plaintiffs for the amount of their claim with interest and costs.

[COMMON PLEAS DIVISION.]

SYLVESTER V. MURRAY.

Contract—Sale of Land—Conditional Promise—Effect of.

BOTH the plaintiff and the defendants moved against the judgment in this case, reported 26 O. R. 599, by motion before the Divisional Court. Statement.

The motion was argued on May 30th, 1895, before MEREDITH, C.J., and MACMAHON, J.

J. J. Scott and *A. McLean Macdonell*, for the plaintiff.

G. H. Watson, Q.C., for the defendants.

The Court dismissed the plaintiff's motion with costs, and on the defendants' appeal, varied the judgment by providing that set-off should be allowed against the plaintiff's claim if they ever became entitled to recover the \$500 sued for. The Court gave no costs on the defendants' motion.

A. H. F. L.

[END OF VOL. XXVI.]

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME .
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

ACCORD AND SATISFACTION.

See NEGLIGENCE, 1.

ADMINISTRATION.

Letters of, Granted by Surrogate Court cannot be Revoked by High Court.]—See HIGH COURT OF JUSTICE.

ADMISSIONS.

On Examination for Discovery to prove Termination of a Prosecution.]—See MALICIOUS PROSECUTION.

AGENT.

Sheriff Selling Lands as Assignee for Creditors is not Agent of the Purchaser.]—See SALE OF LANDS.

Bribery by, at Municipal Election.]—See MUNICIPAL ELECTIONS, 2.

See MUNICIPAL CORPORATIONS, 2
—PRINCIPAL AND AGENT.

AGREEMENT.

To Sell Land by Administrator, Liability to Execution.]—See VENDOR AND PURCHASER, 1.

AGRICULTURAL SOCIETY.

Covered by Mortmain Act.]—See WILL, 4.

ALIMONY.

R. S. O. ch. 44, sec. 29—Restitution of Conjugal Rights—Cohabitation.]—The only bar, under sec. 29 of R. S. O. ch. 44, to an action for alimony against a husband who is living separately from his wife, is cruelty or adultery on the part of the applicant.

Where a husband, who has been insane for years, at intervals, and during such periods of insanity had been confined in an asylum, afterwards declined to live with his wife, being under the suspicion that by doing so he might again be confined in an asylum :—

Held, that she was entitled to alimony, as, upon the evidence, he was living separate from her without any sufficient cause, and under such circumstances as would have entitled her by the law of England, as it stood on 10th June, 1857, to a decree for restitution of conjugal rights.

Judgment of *BOYD, C.*, reversed.
Nelligan v. Nelligan, 8.

AMENDMENT.

At Trial..]—*See* SEDUCTION.

APPORTIONMENT.

Of Insurance Restricted..]—*See* INSURANCE, 2.

APPEAL.

See SESSIONS—STATUTE, 1.

ARBITRATION AND AWARD.

1. *Prohibition—Municipal Corporations—Bridges—Approaches—Lands Injuriouly Affected—Compensation—Liability—City and County—55 Vict. ch. 42, secs. 391, 530, 532, 535 (O.).*]—Where a bridge over a river, which formed the boundary line between a city and a township, within a county, was erected by the councils of the city and county jointly, and in raising

the approaches on the township side certain lands were injuriouly affected, for which the owner claimed compensation :—

Held, having regard to secs. 530, 532, and 535 of the Municipal Act, 55 Vict. ch. 42, that the county only could be compelled to arbitrate in respect of such compensation.

Pratt v. City of Stratford, 16 A. R. 5, followed :—

Held, also, that sec. 391 did not apply to permit an arbitration between the land-owner and the city and county together, nor was such an arbitration otherwise provided for by law.

Prohibition against proceeding with such an arbitration.

Decision of *BOYD, C.*, 25 O. R. 607, reversed. *Re Cummings and County of Carleton et al.*, 1.

2. *Municipal Corporations—Expropriation of Land—Compensation—View of Premises—Effect of—Opinion Evidence—Potential Value of Property—Improvements—Lands Injuriouly Affected—Purchase Money—Interest—Land, when “Taken”—By-Law—Jurisdiction of Arbitrator.*]—A municipal corporation expropriated land for a road, under a by-law which described the land, and provided “that the same is hereby taken and expropriated for and established and confirmed as a public highway or drive,” pursuant to which the corporation took possession.

Upon appeal from an award by which the land-owners were allowed \$5,505 as compensation for the land taken, and \$10,095 for other lands injuriouly affected, and interest on both sums from the date of the by-law :—

Held, that where an arbitrator has viewed the premises, but has not pro-

ceeded upon his view, the Court should not give any greater effect to his findings than if he had not taken a view.

2. As to the weight of evidence : there was ample testimony to warrant the arbitrator, if he gave credit to it, in his findings ; and it was not for the Court to say that he should have preferred the evidence of one set of witnesses to that of the other, in a matter especially where so much depends upon the opinions of persons conversant with the value of land, based upon their knowledge of actual transactions.

3. That the arbitrator was justified in taking into account the potential value of the property, when improved, after allowing for the cost of improving it, as a means of arriving at its actual value.

Ripley v. Great Northern R. W. Co., L. R. 10 Ch. 435 ; *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425 ; and *Boom Co. v. Patterson*, 98 U. S. R. 403, followed.

4. That the whole sum allowed must be taken upon the face of the award to have been allowed as purchase money of the land taken.

James v. Ontario and Quebec R. W. Co., 12 O. R. 624, 15 A. R. 1, specially referred to.

5. That the land must, from the date of the passing of the by-law, be deemed to have been "taken" by the city corporation, and interest was payable on the whole sum from that date.

Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, and *In re Shaw and Corporation of Birmingham*, 27 Ch. D. 614, followed.

6. That the arbitrator had jurisdiction to award interest. *Re Macpherson et al. and The City of Toronto*, 558.

As to Bridges between a County and Township.]—See ARBITRATION AND AWARD, 1.

Finality of Award under Public Schools Act.]—See PUBLIC SCHOOLS, 2.

Invalidity of Award under Public Schools Act.]—See PUBLIC SCHOOLS, 3.

ARREST.

Notice of Action—Malice—Reasonable and Probable Cause—R. S. O. ch. 73—Municipal Corporation—Liability—Ratification.]—The object of the "Act to protect justices of the peace and others from vexatious actions," R. S. O. ch. 73, is for the protection of those fulfilling a public duty, even though in the performance thereof, they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause ; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required.

A breach of a city by-law for driving an omnibus without the license required thereby, does not justify the summary arrest of the offender, even though the officer arresting may have believed that he was acting legally and in the discharge of his official duty.

A resolution of the executive committee of a city council authorizing the city solicitor to defend actions brought against police officers for their alleged illegal acts, does not constitute a ratification thereof by the city, so as to make it liable in damages for such acts. *Kelly v. Barton, Kelly v. Archibald*, 608.

ASSESSMENT AND TAXES.

1. *Local Improvement Rate—Improper Charge on Land—Municipal Act R. S. O. ch. 184, secs. 612, 623—Assessment Act, R. S. O. ch. 193, sec. 119; 55 Vict. ch. 48, sec. 119 (O.).*—Where under a local improvement by-law an assessment is made of the lands benefited and chargeable with the cost of the improvement, and lands having a specified street frontage are thereafter charged with a specific amount of the cost of the improvement which is entered on the assessment and collectors' rolls, and such lands are subsequently subdivided, the whole rate cannot legally be charged against a portion of the lands so subdivided.

The duty of the clerk of the municipality is to bracket on the roll the different subdivisions with the name of the persons assessed for each parcel and the annual sum charged against the original parcel as that for which the sub-lots and persons assessed for them are liable under the special rate. *Capon v. The Corporation of the City of Toronto*, 178.

2. *Absence of By-Law—Leaving Tax Bill on Rate-payer—Demand of Payment—Sufficiency of—55 Vict. ch. 48, sec. 123, sub-sec. 2 (O.).*—The mere delivery to a rate-payer, in places other than cities and towns, of the statement of taxes due, is not sufficient evidence of the demand required to be made for the payment thereof, unless a by-law has been passed under the Consolidated Assessment Act, 1892, sec. 123, sub-sec. 2, empowering the collector to take that course. *McDermott v. Trachsel et al.*, 218.

3. *Sale of Land for—Setting Aside—Assessment Act, R. S. O. ch. 193—55 Vict. ch. 48 (O.).—Sections*

121, 141 and 142.—The provisions of section 121 of the Consolidated Assessment Act as to entering on the roll, by the clerk of the municipality, opposite to each lot or parcel all the rates or charges with which the same is chargeable in separate columns for each rate is imperative, and non-compliance therewith renders such roll a nullity. And where the amount of such rates or taxes for one year was entered on the roll in one sum, and the roll was so transmitted to the treasurer of the county, a tax sale founded thereon was held invalid.

The provision of section 141 of the said Act, which requires a true copy of the lists returned by the assessors to the clerk to be furnished to the county treasurer certified to by the clerk under the seal of the corporation, and that of section 142 which requires an assessor's certificate to each list, are also imperative.

The principle of the decision in *Town of Trenton v. Dyer*, 21 A. R. 379, followed. *Love v. Webster*, 453.

4. *Toronto Gas Company—Mains and Pipes laid under Streets—Mode of Assessment—55 Vict. ch. 48 (O.).*—The mains and pipes of the Toronto Gas Company laid under the public streets are assessable under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), as appurtenant to the land owned by the company for the purposes of its business.

Semble, that the proper mode of assessment in a city divided into wards, would be to value the concern as a whole and then apportion rateably to the wards so much of the value as falls to that part of the concern territorially situate in each locality. *The Consumers' Gas Company of Toronto v. The Corporation of the City of Toronto*, 722.

Covenant to Pay Taxes.]—See
LANDLORD AND TENANT, 2.

Assessment Under Invalid By-law.]—See MUNICIPAL CORPORATIONS, 5.

ASSIGNMENT.

Of Mortgage, Right to.] — See
MORTGAGE, 1.

For Benefit of Creditors.]—See
LANDLORD AND TENANT, 1.

Of Contract, Rights under.]—See
CHOSE IN ACTION.

Refusal of Fiat by Attorney-General for Record of Acquittance.]—See
MALICIOUS PROSECUTION.

BALLOT PAPERS.

Unsealed, Recount of.]—See MUNICIPAL ELECTIONS, 1.

BENEFICIARY.

Rights of, in Insurance.] — See
INSURANCE, 1, 2, 4.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Made by President of a Company without Authority of Directors.]—See COMPANY, 2.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Transfer from Husband to Wife — “Actual and Continued Change of Possession”*—R. S. O. ch. 125, sec. 1—55 Vict. ch. 20, sec. 3—57 Vict. ch. 37, sec. 39.]—A sale of chattels, consisting of household furniture in their residence, between a married woman and her husband, living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for in such a case there cannot be said to be an actual and continued change of possession open and reasonably sufficient to afford public notice thereof as required by the Bills of Sale Act. *Hogaboom v. Graydon*, 298.

2. *Book Debts — Transfer of — Rights of Assignee under Act — Priority*—R. S. O. ch. 125, 55 Vict. ch. 26 (O.).]—Book debts are not within the Chattel Mortgage Act, R. S. O. ch. 125, and amending Act, 55 Vict. ch. 26, and a transfer of them does not require registration.

The latter Act is not retrospective, and does not affect an agreement for future supplies of goods entered into prior to its passing.

An assignee for creditors under R. S. O. ch. 124 and amendments is not in the position of a purchaser for value without notice, and takes no higher rights under the assignment than his assignor had.

Where, therefore, certain book debtors were notified by the assignee for creditors under the Act, of the assignment to him, before notification by certain creditors to whom such debts had been previously assigned, it was held that he did not gain priority thereby.

Decision of *BOYD, C.*, affirmed. *Thibaudeau et al. v. Paul et al.*, 385.

BOND.

Condition of.]—See PRINCIPAL AND SURETY, 1.

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Assignment of.]—See **BILLS OF SALE AND CHATTEL MORTGAGES.**

BRIBERY.

At Municipal Elections.] — See **MUNICIPAL ELECTIONS, 2.**

BRIDGES.

Between County and Township, Arbitration as to.]—See **ARBITRATION AND AWARD, 1.**

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Not Necessary, to Remove Municipal Clerk.]—See **MUNICIPAL CORPORATIONS, 1.**

Appointing School Trustee.]—See **PUBLIC SCHOOLS, 1.**

Want of Proper Notice of.]—See **MUNICIPAL CORPORATIONS, 3.**

CASES.

Aboulloff v. Oppenheimer, 10 Q. B. D. 295, followed.]—See **JUDGMENT, 1.**

Baird, In re, 13 C. L. T. 277, considered.] — See **DEVOLUTION OF ESTATES ACT, 2.**

Bird and Barnard's Contract, Re, 59 L. T. N. S. 166, distinguished.]—See **WILL, 1.**

Boom Co. v. Patterson, 98 U. S. R. 403, followed.]—See **ARBITRATION AND AWARD, 2.**

Bullock v. Downes, 9 H. L. C. 1, followed.]—See **WILL, 5.**

City of Toronto v. Lorsch, 24 O. R. 229, followed.]—See **WATER AND WATERCOURSES, 2.**

Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, followed.]—See **JUSTICE OF THE PEACE, 1.**

Corporation of Parkdale v. West, 12 App. Cas. 602, followed.]—See **RAILWAYS, 2.**

Cradock v. Piper, 1 Macn. & G. 664, followed.]—See **COMPANY, 1.**

Ennor v. Barwell, 2 Giff. 410, distinguished.] — See **WATER AND WATERCOURSES, 1.**

Ford Re, Patten v. Sparks, 72 L. T. N. S. 5, followed.]—See **WILL, 5.**

Godson and The City of Toronto, Re, 16 A. R. 452 followed.]—See **PROHIBITION.**

Gooderham v. City of Toronto, 21 O. R. 120, 19 A. R. 64, followed.]—See **WATER AND WATERCOURSES, 2.**

Gordon v. O'Brien, Re, 11 P. R. 287, approved and followed.]—See **DIVISION COURTS, 2.**

Ives v. Hitchcock, Drap. R. 247, commented on.]—See **DISTRESS.**

James v. Ontario and Quebec R. W. Co., 12 O. R. 624, 15 A. R. 1, specially referred to.]—See **ARBITRATION AND AWARD, 2.**

Jarman's Estate, In re, Leavers v. Clayton, 8 Ch. D. 584, distinguished.]—See **WILL, 8.**

Johnson v. Grand Trunk R. W. Co., 25 O. R. 64, 21 A. R. 408, distinguished.]—See **NEGLIGENCE, 1.**

Kinnaird v. Trollope, 39 Ch. D., followed.]—See MORTGAGE, 2.

Lewis v. Great Western R. W. Co., 3 Q. B. D. 195, followed.]—See PARLIAMENTARY ELECTIONS.

London, Chatham and Dover R. W. Co. v. South-Eastern R. W. Co., [1892] 1 Ch. 120, [1893] A. C. 429, followed.]—See INTEREST.

Merchant Shipping Co. v. Armitage, L. R. 9 Q. B. 99, followed.]—See INTEREST.

Michie v. Reynolds, 24 U. C. R. 303, distinguished.]—See INTEREST.

Molsons Bank v. Heilig, 25 O. R. 503, modified.]—See PRINCIPAL AND SURETY, 2.

Mortimore v. Mortimore, 4 App. Cas. 448, followed.]—See WILL, 5.

Murray v. McSwiney, I. R. 9 C. L. 545, distinguished.]—See DEFA-
MATION.

McLean v. McLeod, 5 P. R. 467, followed.]—See DIVISION COURTS, 5.

Nottawasaga, Public School Trustees of, v. Township of Nottawasaga, 15 A. R. 310, distinguished.]—See DIVISION COURTS, 2.

Parkdale, Corporation of v. West, 12 App. Cas. 602, followed.]—See RAILWAYS, 2.

Pratt v. Bunnell, 21 O. R. 1, not followed.]—See DOWER.

Pratt v. City of Stratford, 16 A. R. 5, followed.]—See ARBITRATION AND AWARD, 1.

Pringle v. Corporation of Napanee, 43 U. C. R. 285, followed.]—See WILL, 4.

Public School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310, distinguished.]—See DIVISION COURTS, 2.

Queen, The v. Huggins, [1895] 1 Q. B. 563, followed.]—See JUSTICE OF THE PEACE, 5.

Regina v. Charles, 24 O. R. 432, distinguished.]—See LIQUOR LICENSE ACT, 2.

Regina v. Langford, 15 O. R. 52, approved.]—See JUSTICE OF THE PEACE, 5.

Regina v. Local Government Board, 10 Q. B. D. 321, followed.]—See PROHIBITION.

Regina v. Martin, 5 Q. B. D. 34, distinguished.]—See EXTRADITION.

Regina v. Williams, 42 U. C. R. 462, distinguished.]—See LIQUOR LICENSE ACT, 1.

Regina v. Young, 5 O. R. 184a, distinguished.]—See JUSTICE OF THE PEACE, 2.

Reid v. Graham Bros., Re, 25 O. R. 573, reversed.]—See DIVISION COURTS, 3.

Rilands Estate, In re Phillips v. Robinson, W. N., 1881, 173, distinguished.]—See WILL, 8.

Ripley v. Great Northern R. W. Co., L. R. 10 Ch. 435, followed.]—See ARBITRATION AND AWARD, 2.

Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, followed.]—See ARBITRATION AND AWARD, 2.

Royal Aquarium Society v. Parkinson, [1892] 1 Q. B. 431, followed.]—See DEFA-
MATION.

Shaw and The Corporation of Birmingham, In re, 27 Ch. D. 614, followed.]—See ARBITRATION AND AWARD, 2.

Smart v. Niagara and Detroit Rivers R. W. Co., 12 C. P. 404, distinguished.]—See INTEREST.

Spartali v. Constantinidi, 20 W. R. 823, considered.]—See INTEREST.

Stobbart v. Guardhouse, 7 O. R. 239, distinguished.]—See WILL, 1.

Toronto, City of, v. Lorsch, 24 O. R. 229, followed.]—See WATER AND WATERCOURSES, 2.

Trenton, Town of v. Dyer, 21 A. R. 379, followed.]—See ASSESSMENT AND TAXES, 3.

Trimble v. Hill, 5 App. Cas. 342, opinion in, followed.]—See JUDGMENT, 1.

Union School Section East and West Wawanosh, 26 O. R. 463, not followed.]—See PUBLIC SCHOOLS, 3.

Vandala v. Larves, 25 Q. B. D. 310, followed.]—See JUDGMENT, 1.

Vernon v. Corporation of Smith's Falls, 21 O. R. 331, followed.]—See MUNICIPAL CORPORATIONS, 1.

Walton v. Apjohn, 5 O. R. 65, distinguished.]—See PARLIAMENTARY ELECTIONS.

Widder v. Buffalo and Lake Huron R. W. Co., 27 U. C. R. 425, followed.]—See ARBITRATION AND AWARD, 2.

Woodruff v. McLennan, 14 A. R. 242, not followed.]—See JUDGMENT, 1.

CAUSE OF ACTION.

Division of.]—See DIVISION COURTS, 2, 4, 6.

Does not Merge in Foreign Judgment.]—See JUDGMENT, 2.

Separate.]—See DIVISION COURTS, 4.

CERTIORARI.

See JUSTICE OF THE PEACE, 1, 2.

CHARITY.

See WILL, 8.

CHATTEL MORTGAGES.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEQUE.

Signed in a fictitious name is a "false document" both at common law and under sec. 421 of the Criminal Code, 1892.]—See EXTRADITION.

CHILDREN.

Right to Parents' Share.]—See WILL, 2.

Of Predeceased Brother or Sister not Entitled to Share in Competition with Surviving Father, Mother, Brother or Sister.]—See DEVOLUTION OF ESTATES ACT.

CHOSE IN ACTION.

Contract—Right of Contractee to make Deductions—Assignment of Benefit of Contract—Rights of Assignee—R. S. O. ch. 122, secs. 6-13.]—A contract between the defendants and the plaintiff's assignor for the paving of a certain street provided that the former might deduct and pay the price of any materials unpaid for by the latter. The contractor assigned to the plaintiff all moneys to become due under the contract, of which the defendants were duly notified. Subsequently the defendants deducted from the contract moneys the amount of a claim for materials furnished to the contractor, and paid the same :—

Held, that they had a right so to do, the plaintiff's assignment being necessarily subject to the provisions of the original contract. *Farquhar v. The Corporation of the City of Toronto*, 356.

CLUB.

Keeping Liquor by Manager of.]—*See LIQUOR LICENSE ACT*, 2.

COLLATERAL SECURITY.

Payments on—Credit on Principal Debt—Judgment—Election—Res Judicata.]—The plaintiffs gave the defendants a line of credit "to be secured by collections deposited," in pursuance of which notes of defendants' customers were from time to time deposited by defendants with plaintiffs as collateral to the defendants' own notes. These collaterals at maturity were dealt with by defendants, and when paid the proceeds went to their credit and were

at their disposal. The defendants failed and plaintiffs recovered judgments against them on the earlier maturing notes of the defendants. Both before and after such judgments the plaintiffs had collected on the collaterals large sums, considerably less than their whole claim, which they carried to a suspense account, and refused to credit any part on their judgments. An issue was directed on the application of defendants to try whether plaintiffs had received any payments which they should have credited on the judgments, and judgment therein was given in the plaintiffs' favour. Subsequently the plaintiffs brought this action for the balance of their claim and refused to credit the collateral suspense account :—

Held, that the decision in the issue although *res judicata* was not conclusive in this action, and that the plaintiffs' course in those proceedings amounted to an election to apply the amount of the suspense account upon that portion of the debt not then due and that they were bound to credit the amount of the suspense account in this action. *Molsons Bank v. Cooper et al.*, 575.

COMPANY.

1. *Director—Solicitor—Right to Costs—Contributory—Set-off.*]—Where a director, who was also president, of a company was appointed by the board of directors and acted as solicitor for the company :—

Held, in winding-up proceedings, that he was entitled to profit costs in respect of causes in Court conducted by him as solicitor for the company, but not in respect of busi-

ness done out of Court, and was entitled to set off the amount of such costs against the amount of his liability as a shareholder.

Decision of the Master in Ordinary reversed.

Craddock v. Piper, 1 Macn. & G. 664, followed. *Re Mimico Sewer Pipe and Brick Manufacturing Co.*, *Pearson's Case*, 289.

2. *Promissory Note—Banks and Banking—Discount—Account in Name of President—Misappropriation of Funds—Application of Discount to Company's Benefit.*—One S., president and treasurer of a cheese company, kept an account with the defendants, private bankers, on behalf of the company, headed "S., president of B. Cheese Company," upon which he drew from time to time by cheques signed "S., president." The account being overdrawn, the defendants, in good faith, at the request of S., discounted a note in their own favour signed "S., president," with the seal of the company attached (but made without the knowledge or authority of the directors, by whom with the president under the by-laws of the company its affairs were to be managed), and placed the proceeds to the credit of the account, which were afterwards chequed out by S. to pay creditors of the company. At this time S. was a defaulter to the company to a larger amount than the note. In the meanwhile after two renewals the note was charged up by the defendants to the account, with the consent of S. but without the authority of the directors who were unaware that S. was a defaulter, but knew that he kept the bank account in his own name as president, depositing therein the proceeds of sales of cheese and drawing upon

it to pay the company's creditors. The company now sued to recover the amount of the note from the defendants, who did not plead fraud, but alleged they had fully accounted:—

Held, that the plaintiffs were bound to affirm or disaffirm the transaction altogether and could not repudiate the liability upon the note and at the same time take the benefit of it.

Decision of STREET, J., reversed. *The Bridgewater Cheese Factory Company v. Murphy*, 327.

CONDITION.

In a Bond "on Demand."—See PRINCIPAL AND SURETY, 1.

In Employer's Liability Policy.—See CONTRACT, 1.

CONSPIRACY.

To Defraud.—See EXTRADITION.

CONSTITUTIONAL LAW.

Powers of Dominion Parliament—Assault and Battery—Bar of Civil Remedy—Criminal Code, 1892—55-56 Vict. ch. 29, secs. 865, 866.—Sections 865 and 866 of the Criminal Code, 1892, whereby it is enacted that a person who has obtained a certificate of the Justice, who tried the case, that a charge against him of assault and battery has been dismissed, or who has paid the penalty or suffered the imprisonment awarded shall be released from all further proceedings, civil or criminal, for the same cause, are *intra vires* of the Dominion Parliament. *Flick v. Brisbin*, 423.

CONTRACT.

1. *Employer's Liability Policy—Condition—Construction—Defence of Actions brought by Employees.*—In an action upon an employer's liability policy, whereby the defendants agreed to pay the plaintiff all sums up to a certain limit and full costs of suit, if any, in respect of which the plaintiff should become liable to his employees for injuries received whilst in his service, subject to the condition, amongst others, that "if any proceedings be taken to enforce any claim, the company shall have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer, retaining or employing their own solicitors and counsel therefor :"—

Held, that the plaintiff was not entitled, in the face of such a stipulation, to claim from the defendants the amount of a judgment obtained against him by an employee in an action defended by the plaintiff through his own solicitor and counsel, leaving the defendants to shew as a defence or by way of counterclaim that they could have done better by defending it themselves; nor was an offer by the plaintiff, at a time when the action was at issue and on the peremptory list for trial the following day, to hand over the defence to the defendant's solicitors, a sufficient compliance with the condition. *Wythe v. Manufacturers' Accident Insurance Company*, 153.

2. *Sale of Land—Conditional Promise—Effect of.*—After negotiations had taken place for the sale of a farm at \$9,500, the following contract was signed by the purchasers :—"We agree to take your farm and pay you \$9,000, and if we

get along fairly well, we will give you the other \$500 as soon as we are able" :—

Held, that the provision as to the \$500 was a conditional promise which might be recovered on proof that the purchasers were of ability to pay, which the evidence in this case failed to shew. *Sylvester v. Murray*, 599.

Affirmed by Divisional Court, 765.

Of Guarantee for Employee.—See INSURANCE, 3.

To Purchase Land from Administrator.—See VENDOR AND PURCHASER, 1.

CONTRACTOR.

Married Woman, as.—See HUSBAND AND WIFE, 1.

CONVICTION.

Of one Justice of the Peace where Penalty for Offence Charged exceeded \$30.—See JUSTICE OF THE PEACE, 4.

On Summons, Quashed.—See JUSTICE OF THE PEACE, 3.

Quashed, where Complainant and Convicting Justice of the Peace were Father and Son.—See JUSTICE OF THE PEACE, 5.

Summary.—See JUSTICE OF THE PEACE, 1, 2.

COPYRIGHT.

Penalty—Printing Canadian Copyright Work Abroad—Publication in Canada—Impressing thereon fact of Canadian Copyright—R. S. C. ch. 62, sec. 33.—Section 33 of the Copy-

right Act, R. S. C. ch 62, does not impose the penalty mentioned therein upon the owner of a Canadian copy-right in respect to a musical composition who has the work printed abroad, and inserts notification of the existence of such copyright on copies published in Canada. *Lancefield v. The Anglo-Canadian Music Publishing Association (Limited)*, 457.

COSTS.

Considered.—See INTEREST.

Of Quashing Conviction, Withheld.—See JUSTICE OF THE PEACE, 5.

COUNTY JUDGE.

Recount of Municipal Election Ballots by.—See MUNICIPAL ELECTIONS, 1.

Hearing of Appeal by, under Ditches and Watercourses Act.—See STATUTES, 2.

COURT OF APPEAL (ENGLAND).

Decisions of as Precedents.—See JUDGMENT, 1.

CRIMINAL CODE, 1892.

(55 & 56 Vict. ch. 29 (D).)

Sec. 13. See LIQUOR LICENSE ACT, 1.—Secs. 197 and 198, GAMING.—Sec. 421, EXTRADITION.—Secs. 559, 843, 850 and 889, JUSTICE OF THE PEACE, 2.—Sec. 641, CRIMINAL LAW, 2.—Sec. 684, CRIMINAL LAW, 1.—Secs. 865 and 866, CONSTITUTIONAL LAW.

CRIMINAL LAW.

1. *Forgery—Evidence—Corroboration—Criminal Code, 1892, sec. 684.*—Where on a charge of forgery, in addition to evidence of one witness that the forged documents were written by the accused, it was also proved by the same witness that certain names in a book written by the same hand as the forged documents, were in the handwriting of the accused :—

Held, that this was not sufficient corroboration under section 684 of the Criminal Code, 1892. *Regina v. McBride*, 639.

2. *Variance between Indictment and Charge—False Pretences—Criminal Code, 1892, sec. 641.*—On a charge of stealing 2,200 bushels of beans for which he was committed for trial the evidence before the magistrate disclosed that the prisoner had obtained certain cheques on the false pretence that “there were 2,680 bushels of beans” in his warehouse. At the Assizes he was indicted for obtaining the cheques on the false pretence “that there was then a large quantity of beans, to wit, 2,680 bushels” in his warehouse. During the progress of the trial the indictment was amended by striking out the words “a large quantity of beans, to wit,” and the prisoner was convicted thereon :—

Held, no such variation as prevented the indictment being preferred for a charge founded upon the facts or evidence disclosed within the meaning of section 641 of the Criminal Code, 1892 :—

Held, also, that the prisoner not having been misled or prejudiced by the amendment, it was properly made. *Regina v. Patterson*, 656.

3. *Coroner's Inquest—Evidence—Subsequent Charge of Murder—Canada Evidence Act, 1893—Motive—Prior Attempt to Insure.*—A coroner's court is a criminal court, and the depositions of a witness before such court who is subsequently charged with murder cannot, since the Canada Evidence Act, 1893, be received in evidence against him at the trial, notwithstanding privilege was not claimed by him at the inquest.

On a trial for murder, the alleged motive being the obtaining of insurance moneys on policies effected by the prisoner on the life of the deceased, evidence of a previous attempt by the prisoner to insure another person for his own benefit cannot be given in evidence against him. *Regina v. Hendershott and Welter*, 678.

DAMAGES.

See WATERS AND WATERCOURSES, 2.

On Impounding Cattle or for Trespass.—See DISTRESS.

DEBENTURES.

For Public Park Purposes.—See MUNICIPAL CORPORATIONS, 2.

DEFAMATION.

Slander—Privileged Occasion—Interest—Duty—Belief—Express Malice—Burden of Proof—Evidence—Notice of Action—Public Officer.—The plaintiff, the wife of a postmaster, complained of slander by the defendant, an assistant post office inspector, to the effect that she had taken money from letters and had

given him a written confession of her guilt:—

Held, that as to statements made in the discharge of the defendant's official duty, to the plaintiff's husband as postmaster, and to two other persons as sureties for him, the occasions were privileged; but not so as to statements made to a partner of one of the sureties, who used the post office, and to whose business premises the defendant contemplated removing it; for the defendant and the partner had no such common interest in the matter as justified the communication, nor was there any public or moral or social duty resting on the defendant which justified him in making it. Even had the evidence shewn that the defendant honestly believed that such a duty rested upon him or that there was such a common interest, if such belief were unfounded, the occasion would not have been privileged.

2. Where the occasion is privileged, the plaintiff's case fails, unless there is evidence of malice in fact, and the burden of proving this is on the plaintiff, who must adduce evidence upon which a jury might say that the defendant abused the occasion either by wilfully stating as true that which he knew to be untrue, or stating it in reckless disregard of whether it was true or false.

And where the plaintiff in her evidence denied that she had made a confession to the defendant, but admitted in a qualified way that after her denial the defendant continued to assert to her, and appeared to believe, that she had made one:—

Held, that, in the absence of a clear admission by the plaintiff, there was evidence of malice in fact to go to the jury.

3. The defendant was not entitled to notice of action as a public officer;

the statutes requiring such notice applying only to actions brought for acts done.

Royal Aquarium Society v. Parkinson, [1892] 1 Q. B. 431, followed.

Murray v. McSwiney, I. R. 9 C. L. 545, distinguished.

Semble, also, that the statutes requiring notice of action cannot be invoked where the words spoken are defamatory and have been uttered with express malice. *Hanes v. Burnham*, 528.

DEMURRER.

Effect of a Replication as a.]—See JUDGMENT, 1.

DEVOLUTION OF ESTATES ACT.

1. *R. S. O. ch. 108, sec. 6—Rights of Children of Predeceased Sister of Intestate.*]—On the death of a person, intestate, leaving no issue, the children of a predeceased sister or brother are not entitled under section 6 of the Devolution of Estates Act, R. S. O. ch. 108, to share in competition with a surviving father, mother, brother or sister of the intestate. *Re Colquhoun*, 104.

2. *Executors and Administrators—Registration of Caution—54 Vict. ch. 18 (O.)—56 Vict. ch. 20 (O.).*]—The provisions of 56 Vict. ch. 20 (O.), as to registration of caution apply to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner. By virtue of section 2, the effect of such subsequent registration would be only to withdraw to or vest in the executor or administrator so much of the land as is properly

available for the purposes of administration.

The provisions of 56 Vict. ch. 20 (O.), are so engrafted on 54 Vict. ch. 18 as to make both Acts apply to all persons dying after 1st July, 1886.

In re Baird, 13 C. L. T. 277, reconsidered. *In re Martin*, 465.

3. *Executors and Administrators—Sale of Infants' Lands—Consent of Official Guardian—R. S. O. ch. 108, sec. 8, sub-sec. 1—54 Vict. ch. 18, sec. 2 (O.).*]—Under 54 Vict. ch. 18, sec. 2 (O.), the approval of the official guardian to a sale of land by executors or administrators is now required only where the sale is for the purpose of distribution simply, and then only where there are infants interested, or heirs or devisees who do not concur.

Where administrators in contracting to sell lands under circumstances not requiring the consent of the official guardian, nevertheless made the contract of sale subject to his approval, and, as was alleged, lost the sale by having through negligence and delay failed to obtain such approval within the time required by the contract, but had acted throughout with good faith and to the best of their judgment:—

Held, that they were not liable to make good to the estate the deficiency resulting from a resale.

Under the above Acts, executors and administrators are not, in all respects, in the same position as a trustee for sale of lands. Upon the latter is cast a duty to sell, upon the former a mere discretion to be exercised only for certain purposes and in certain events.

Semble, where the approval of the official guardian is not required,

notice need not be given to him under Rule 1005. *In Re Fletcher's Estate*, 499.

DIRECTOR.

Right to Profit Costs when a Solicitor.—See COMPANY, 1.

DISTRESS.

Impounding—Cattle Straying from One Enclosure into Another—"Running at Large"—*Pound-keeper—R. S. O. ch. 215.*—The effect of sections 2, 3, 6, 20 and 21 of the Act respecting pounds, R. S. O. ch. 215, is to give a right to impound cattle trespassing and doing damage, but with a condition that if it be found that the fence broken is not a lawful fence, then no damages can be obtained by the impounding, whatever may be done in an action of trespass.

Cattle feeding in the owner's enclosure, or shut up in his stables, cannot be held to be running at large when they may happen to escape from such stable or enclosure into the neighbouring grounds.

Ives v. Hitchcock, Drap. R. 247, commented on. *McSloy v. Smith*, 508.

DITCHES AND WATERCOURSES ACT.

See STATUTES, 1.

DIVISION COURTS.

1. *Prohibition—Right to Jury—Action of Tort—R. S. O. ch. 51, sec. 154.*—A claim by an insurance com-

pany, as indorsed on a Division Court summons, to recover back from the insured the sum of \$30 loss under an insurance effected by him, payment of which is alleged to have been procured by his false and fraudulent representations, is a claim arising *ex delicto*, and can be required to be tried by a jury under R. S. O. ch. 51, sec. 154. *Re London Mutual Fire Insurance Company of Canada v. McFarlane et al.*, 15.

2. *Prohibition—Money Payable by Instalments with Interest—Dividing Cause of Action—R. S. O. ch. 51, sec. 77.*—Under an agreement for sale of land, the balance of the purchase money was payable by instalments with interest at a named rate half-yearly; and at a time when three of the instalments of principal, and interest amounting to \$70, and three years' taxes, were overdue, an action was commenced in a Division Court for the arrears of interest and two years' taxes, \$95.30 :—

Held, reversing the decision of BOYD, C., 25 O. R. 253, who had refused prohibition, that the plaintiffs could have recovered all the purchase money and interest due when the action was begun under one count in a Superior Court; and therefore there was a dividing of their cause of action within the meaning of sec. 77 of the Division Courts Act, R. S. O. ch. 51.

Re Gordon v. O'Brien, 11 P. R. 287, approved and followed.

Public School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310, distinguished. *Re Clark et al. v. Barber*, 47.

3. *Prohibition—Judgment Against Firm in Partnership Name—Non-service on Partner—Judgment Sum-*

mons—Committal Order.—An order for committal under the judgment summons provisions of the Division Court Act is not process of contempt, but is in the nature of execution or limited or qualified execution.

A member of a partnership, against which a judgment has been recovered in a Division Court in the firm name, who has not been personally served with the summons, and has not admitted himself to be or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons.

Judgment of BOYD, C., 25 O. R. 573, reversed on this point and prohibition granted. *In re Reid v. Graham Bros.*, 126.

4. *Prohibition—Promissory Notes—Separate Causes of Action—Title to Land—Sale of Liquor—Lost Note.*—In settlement of an action on a promissory note for \$383 given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern-keeper, agreed in writing to give, and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of \$125 each :—

Held (1), that each note was a separate cause of action and could be sued in the Division Court.

(2) That the title to land did not come in question.

(3) That the words "liquors drunk in a tavern or alehouse" in subsection 2 and "such liquors" in subsection 3 of section 69 of the Division Court Act mean liquors drunk in the tavern or alehouse of the vendor.

(4) The non-filing of a bond of indemnity for a lost note is a matter

of practice, and is not a ground for prohibition.

Prohibition to a Division Court refused. *Re McGolrick v. Ryall*, 435.

5. *Garnishee Proceedings—Judgment Against Garnishee—Motion for New Trial after Fourteen Days—R. S. O. ch. 51, secs. 173-199.*—The time limit for applying for a new trial in ordinary litigation in the Division Court does not apply to garnishment trials, and so long as the money remains unpaid after judgment against a garnishee, he may apply for relief either by paying into Court, or for a new trial, in the event of a new claim being made known to him.

McLean v. McLeod, 5 P. R. 467, followed.

Prohibition refused. *Hobson v. Shannon*, 554.

6. *Prohibition—Mortgage—Contract or Obligation to Indemnify—Action for Interest Only—Dividing Cause of Action—R. S. O. ch. 51, sec. 77.*—The plaintiff conveyed land to the defendant subject to a mortgage, and after the maturity thereof paid the mortgagee two gales of interest since accrued, which he sought to recover from the defendant by action in a Division Court :—

Held, that there was no splitting of the cause of action within section 77 of the Division Courts Act, R. S. O. ch. 51.

Decision of ARMOUR, C. J., *ante* p. 123, reversed. *Re Ball v. Bell*, 601.

DOWER.

Mortgage for Money Borrowed—Bar of Dower—Sale of Mortgaged Land—Right to Dower in Surplus.—Where lands mortgaged to secure a

loan have been sold by the mortgagee, the wife of the mortgagor, who has joined in the mortgage to bar her dower, is entitled to dower out of the surplus, computed on what would be the full value of the land, if unencumbered.

Pratt v. Bunnell, 21 O. R. 1, not followed so far as the reasoning and dicta therein are opposed to the above decision.]—*Gemmill v. Nelligan*, 307.

Election, as to.]—See WILL, 5.

Rights of Dowress under Judgment Establishing a Will of Land, Subject to Dower.]—See JUDGMENT, 3.

EASEMENT.

See WATER AND WATERCOURSES, 1.

ELECTIONS.

See MUNICIPAL ELECTIONS, 1, 2—
PARLIAMENTARY ELECTIONS.

EQUITY OF REDEMPTION.

Sale of.]—See MORTGAGE, 1.

ESTATE.

Life, under Will.]—See WILL, 1,

Tail, by Implication.]—See WILL, 1.

Separate, of Married Woman when Co-contractor.]—See HUSBAND AND WIFE, 1.

Vested.]—See WILL, 6.

ESTOPPEL.

See NEGLIGENCE, 1.

EVIDENCE.

Corroboration—Two Defendants in Same Interest—R. S. O. ch. 61, sec. 10—R. S. O. ch. 1, sec. 8, subsec. 24.]—In an action by an executor of a deceased mortgagee against two joint mortgagors, both the latter deposed to certain payments made by one or the other in the lifetime of the mortgagee :—

Held, that each mortgagor was an opposite or interested party in the same degree and of the same kind, and constituted together an opposite or interested party within the meaning of the section, and the fact of both the mortgagors testifying to such payments did not constitute corroboration within the meaning of R. S. O. ch. 61, sec. 10. *Taylor v. Regis*, 483.

Corroboration in Forgery Case.]—
See CRIMINAL LAW, 1.

Exclusion of.]—See JUSTICE OF THE PEACE, 2.

Given before Coroner cannot be used against the Witness on his Subsequent Trial for Murder.]—See CRIMINAL LAW, 3.

Of Malice.]—See DEFAMATION.

Of Termination of a Prosecution.]—
See MALICIOUS PROSECUTION.

Presumption of Compulsion by Husband of Wife Rebutted.]—See LIQUOR LICENSE ACT, 1.

EXAMINATION.

Proof of Termination of a Prosecution by Admissions on Examination for Discovery.—See MALICIOUS PROSECUTION.

EXECUTION.

Effect of Committal under Judgment Summons provisions of the Division Court Act, as.—See DIVISION COURTS, 3.

No Charge on Lands in Hands of Administrator, contracted to be Sold.—See VENDOR AND PURCHASER, 1.

Order for Issue of, against Goods of a Testator or Intestate in the Hands of an Executor or Administrator should not be made ex parte.—See VENDOR AND PURCHASER, 1.

EXECUTORS AND ADMINISTRATORS.

Of Principal on a Bond, Demand on.—See PRINCIPAL AND SURETY, 1.

Sale of Land by.—See DEVOLUTION OF ESTATES ACT, 3.

Vesting Land in, by Registration of Caution.—See DEVOLUTION OF ESTATES ACT, 2.

EXECUTORY DEVISE.

See WILL, 6, 7.

EXTRADITION.

"False Document"—Uttering of—Conspiracy to Defraud—Cheque—Fictitious Bank Account—Law of Canada—Defective Warrant—Amend-

ment.—In extradition proceedings, it is sufficient if the evidence disclose that the offence under the Extradition Acts is one which, according to the laws of Canada, would justify the committal for trial of the offender had the offence been committed therein, it not being essential to shew that the offence was of the character charged according to the laws of the foreign country where it was alleged to have been committed; and *quere*, whether evidence is admissible to shew what the foreign law is.

In pursuance of a fraudulent conspiracy between the prisoner and his brother, a cheque was drawn by the latter, under a fictitious name, on a bank in which an account had been opened by him in such fictitious name, there being, to the knowledge of the prisoner, no funds to meet it, and which, on the faith of its being a genuine cheque, another bank was induced by the prisoner to cash:—

Held, that the cheque was a "false document," both at common law and under section 421 of the Criminal Code, 1892, and that there was sufficient evidence to justify the committal of the prisoner for extradition for uttering a forged instrument.

Regina v. Martin, 5 Q. B. D. 34, distinguished.

Where in such proceedings, the warrant of commitment stated that the prisoner had been "committed" for an extraditable offence, instead of his having been "accused" thereof, the fact that the evidence shewed such an offence will not warrant the Court in remanding the prisoner for extradition; but the Court may, if necessary, permit the return to be amended, and for such purpose allow it to be taken off the files and refiled. *Re Cornelius F. Murphy*, 163.

FENCES.

*Division Fences—Proper Mode of Construction — Trespass — Fence-Viewers—R. S. O. ch. 219, sec. 3—Toronto City By-law No. 2447.]—*The Line Fence Act, R. S. O. ch. 219, sec. 3, provides that "owners of occupied adjoining lands shall make, keep up, and repair a just proportion of the fence which marks the boundary between them":—

Held, per FERGUSON, J., affirming the decision of ARMOUR, C. J., that a boundary fence, under R. S. O. ch. 219, should be so placed that when completed the vertical centre of the board wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land:—

Held, per BOYD, C., contra, that if the boundary line be between the posts on one side of the fence, and the scantling and boards on the other, so that there is practical equality in the amount of space occupied by the posts and that occupied by the continuous boards, and if that method is sanctioned by local usage, neither owner has legal ground for complaint. *Cook v. Tate*, 403.

FIXTURES.

*Mortgage— Dwelling-house—Hot-air Furnace—Removal of—Right to Replacement.]—*A hot-air furnace fixed to the floor by screws and placed in a dwelling-house, during its construction, by a mortgagor, in pursuance of the agreement for the loan on the property, cannot be removed by him during the currency of the mortgage. The mortgagee is entitled to an order restraining its

removal, and if removed no title to it passes as against the mortgagee even to an innocent purchaser, and the former is entitled to an order for its replacement. *The Scottish American Investment Co. v. Sexton et al., The Scottish American Investment Co. v. Sexton*, 77.

See LANDLORD AND TENANT, 1.

FOREIGN JUDGMENT.

See JUDGMENT.

FRAUDULENT CONVEYANCE.

*Mortgage—Subsequent Voluntary Settlement by Mortgagor—Validity of, against Mortgagee.]—*Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within the 13 Eliz. ch. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the loan was of less value than the amount thereof.

Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although, from the stagnation in real estate when the mortgage matured; a sale of the property for the amount of the indebtedness thereon could not be effected. *Crombie v. Young*, 194.

FURNACE.

As a Fixture.—See **FIXTURES.**

GAMING.

Betting—Keeping Place Therefor—Horse-Race in Foreign Country—Criminal Code, secs. 197, 198.—

The defendant occupied a tent in a village open to and frequented by the public, in which there was a telegraph wire to an incorporated race track in the United States, where horse racing and betting was legalized. In the tent was a blackboard on which were the names of the horses and jockeys taking part in the race, with the weights and the track quotations, and as the race was being run, an operator called off the progress thereof, giving the name of the winner and of the second and third horses, and marked them on the board. Duplicate tickets were furnished in the tent to applicants, which requested defendant to telegraph one B. at the race track to place a certain amount of money on a horse named by the applicant at track quotations, and upon transmission thereof, the applicant agreed to pay defendant ten cents, and that all liability on defendant's part should cease. On the tickets being handed in, one of them was stamped with the date of its receipt and returned to the applicant. The aggregate amount of the money so received was notified by telegram to B. and placed by him before the race with bookmakers on the track, B. paying defendant a percentage on the moneys received for him and ten cents on each application. B. had an agent in another part of the village, whom he furnished with money to pay any winnings by remitting same to him or giving

him orders on defendant for stated sums:—

Held, that the defendant was properly convicted under sections 197 and 198 of the Code, of keeping a common betting house, the place in question being opened and kept for the reception of money by defendant on behalf of B. as consideration for an undertaking to pay money thereafter to the depositor on the event of a horse race. *Regina v. Giles*, 586.

HIGH COURT OF JUSTICE.

Jurisdiction—Revocation of Letters of Administration—Surrogate Court.—The High Court of Justice for Ontario has no jurisdiction to revoke the grant by a Surrogate Court of letters of administration. *McPherson v. Irvine*, 438.

HIGHWAY.

Over Water Lot.—See **WATER AND WATERCOURSES**, 2.

HUSBAND AND WIFE.

Liability of Married Woman as Co-contractor—Separate Estate.—A married woman having separate estate may enter into a contract along with others.

Semble, if she having no separate estate is not liable under such a contract the other contractors are liable without her. *Dingman v. Harris*, 84.

Sale of Liquor by Wife in Presence of Husband.—See **LIQUOR LICENSE ACT.**

Sale of Chattels from Husband to Wife.]—See **BILLS OF SALE AND CHATTEL MORTGAGES**, 1.

INDIANS.

Capacity to Make a Will—Female Indian—43 Vict. ch. 28, secs. 16-20 (D.)—R. S. C. ch. 43.]—An Indian male or female may make a will, and may by such will dispose of real or personal property subject to the provisions of the Indian Act, R. S. C. ch. 43, or other statute.

Quere, whether the last part of section 20 of the Indian Act, R. S. C. ch. 43, does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male or female, to the Superintendent-General so that his decision, and not that of the Court should determine such questions. *Johnson v. Jones*, 109.

INFANTS.

Sale of Lands—Estate Tail—R. S. O. ch. 137, sec. 3.]—On an application for a ruling as to whether the estate of an infant being an estate tail in possession could be sold under R. S. O. ch. 137:—

Held, that the Act applies to an estate tail. *In re Gray*, 355.

Sale of Lands of, by Administrator.]—See **DEVOLUTION OF ESTATES ACT**, 3.

INSURANCE.

1. *Life — Policy — Interest and Rights of Insured and of Beneficiaries—Assignment of Policy to Secure Debt—Judgment for Debt, Effect of*

—*Loss of Assignment—Secondary Evidence—Affidavits—Rule 585—Costs.*]—Where an insurance was effected upon the life of a person for the benefit of her father, brothers, and sisters, the plaintiffs:—

Held, that the beneficial interest in the policy, as soon as it was issued, vested in the plaintiffs, and the contract of the insurers being to pay them the moneys payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them or of their right to call upon the insurers for payment; and an assignment made by her and her father to a stranger to secure a debt had no effect upon such interest or right of the plaintiffs, except that of the father; and the assignee, under the circumstances in evidence, became the mortgagee of such interest and right; and the recovery of a judgment by the assignee against the father for the amount of the debt did not prejudicially affect the security.

Further evidence of the loss of the policy by affidavit received by the Divisional Court under Con. Rule 585.

Consideration of question of costs. *Dolen et al. v. Metropolitan Life Insurance Company et al.*, 67.

2. *Life—R. S. O. ch. 136, sec. 6 (1)—51 Vict. ch. 22, sec. 3—53 Vict. ch. 39, sec. 6—Wives and Children — Policy — Will — Variance—Apportionment.*]—Under sec. 6 (1) of the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, as amended by 51 Vict. ch. 22, sec. 3, and 53 Vict. ch. 39, sec. 6, the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be, shall be entitled to the in-

surance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be. *Re Grant*, 120 and 485.

See now 58 VICT. CH. 34, SEC. 12 (O.).

3. *Employee's Guarantee Contract—Renewal—Ontario Insurance Corporations Act, 1892, sec. 32, sub-sec. (2)—Condition—Misstatements—Materiality.*]—By a contract in writing, made in 1890, the defendants agreed to guarantee the plaintiffs against pecuniary loss by reason of fraud or dishonesty on the part of an employee during one year from the date of the contract, or during any year thereafter in respect of which the defendants should consent to accept the premium which was the consideration for the contract. The defendants accepted the premium in respect of each of the three following years, and gave receipts entitled "renewal receipts," in which the premiums were referred to as "renewal premiums :"—

Held, that the contract was a contract of insurance made or renewed after the commencement of the Ontario Insurance Corporations Act, 1892, within the meaning of section 33.

Held, also, that upon the true construction of sub-section (2), the contract could not be avoided by reason of misstatements in the application therefor, because a stipulation on the face of the contract providing for the avoidance thereof for such misstatements was not, in stated terms, limited to cases in which such misstatements were material to the contract. *Village of London West v. London Guarantee and Accident Company*, 520.

4. *Life—Foreign Benevolent Society—Policy—Conditions not on Face—Rules of Society—52 Vict. ch. 32, sec. 4 (O.)—51 Vict. ch. 22, sec. 2 (O.)—Beneficiaries—Right of Society to Limit to Certain Class—Substitution of Others by Will.*]—A policy upon the life of the plaintiff's deceased husband was issued before his marriage by a foreign benevolent society not incorporated or registered under any Act of this Province, payable to his mother, who predeceased him, or his executors. By one of the by-laws of the society it was provided that where the insured married after the date of the policy, it *ipso facto* became payable to the widow, "unless otherwise ordered after date of such marriage." Under another by-law the policy could be made payable only to a wife, an affianced wife, a blood relation, or a person dependent on the assured, and was not to be willed or transferred to any other person. By his will the deceased purported to give to his widow the amount of this and another insurance, subject, however, to the payment of his debts :—

Held, that the policy was capable of being controlled by conditions not set out upon its face, because sec. 4 of 52 Vict. ch. 32 (O.), amending the Ontario Insurance Act, R. S. O. ch. 167, applies only to the companies to which the latter Act applies ; and as the insurance and the rights of the parties under it did not depend upon anything contained in the Act to secure to wives and children the benefit of life insurance, R. S. O. ch. 136, it was not necessary to consider whether it was brought within the scope of that Act by its amendment by 51 Vict. ch. 22, sec. 2 (O.) ; and, therefore, the binding terms of the contract were to be found upon its face and in the rules

of the society, which formed part of the contract:—

Held, also, that under the terms upon which the society agreed to pay this money, the insured had no power to bequeath any part of it to his executors or his creditors, and the society had the right to say that their contract was to pay the money only within a certain class; that the insured had no right to substitute a beneficiary outside that class; and therefore the money belonged to the widow free from the obligation to pay debts. *Morgan v. Hunt et al.*, 568.

5. *Life—Payment of Premium—Condition—Credit—Authority of Manager.*—By an application for life insurance, the interim receipt and the policy, it was provided that no policy was to be in force until actual payment of the first premium to an authorized agent and the delivery of the necessary receipt signed by the general manager of the company. The general manager, who was paid by commission, made an agreement with an applicant for a policy that work done by the applicant for himself personally would be taken in payment of the first premium, and gave him a receipt for it without, however, paying the company:—

Held, that the company was not bound. *Tiernan v. People's Life Insurance Company*, 596.

INTEREST.

Trade Agreement—Net Profits—Ascertainment—R. S. O. ch. 44, secs 85, 86—Damages for Delay—Costs.—In an action brought in 1891, upon a written agreement—silent as to

interest—to recover the amount of net profits of a certain business for a period ending 1st May, 1885, as ascertained in the manner provided for in the agreement, but not so ascertained until after the time fixed thereby, it was adjudged at the trial that the ascertainment was void, and a reference was directed to a Master to take an account.

Upon appeal from the report:—

Held, that the mode of computation provided by the contract being departed from, no certainty remained as to the amount payable or the time of payment, to ascertain which something more than an arithmetical computation was required; and therefore interest could not be allowed under sec. 86, sub-sec. 1, of the Judicature Act, R. S. O. ch. 44.

Merchant Shipping Co. v. Armistage, L. R. 9 Q. B. 99, and *London, Chatham, and Dover R. W. Co. v. South-Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A. C. 429, followed.

Spartali v. Constantinidi, 20 W. R. 823, considered.

Nor could interest be allowed under sec. 85, as in a case in which it had been usual for a jury to allow interest; for no debt existed which was payable until it was ascertained, either in the manner provided by the agreement, or by the account taken in the action.

Smart v. Niagara and Detroit Rivers R. W. Co., 12 C. P. 404, and *Michie v. Reynolds*, 24 U. C. R. 303, distinguished.

Nor could equitable damages, in the nature of interest, for delay, be allowed to the plaintiffs, having regard to their own delay in bringing the action, and to the fact that the omission to ascertain the amount within the time fixed by the agreement was not by the fault of the defendant. Consideration of the

question of costs of the action, reference, and appeals. *McCullough et al. v. Clemow*, 467.

Allowance of, by Arbitrator.—See ARBITRATION AND AWARD, 2.

Right to Recover Interest on Mortgage in Division Court after Maturity of Mortgage.—See DIVISION COURTS, 6.

INTOXICATING LIQUORS.

Injury while Intoxicated—Liquor Supplied by Two Tavern-keepers—Joint Liability—R. S. O. ch. 194, sec. 122.]—Where a person comes to his death while intoxicated and the intoxicating liquor has been supplied to him at two taverns and to excess in each so that an action might have been brought successfully against either of the tavern-keepers under R. S. O. ch. 194, sec. 122, they cannot be sued jointly.

The jury having in such an action in which tavern-keepers had been jointly sued assessed the damages at the trial at different sums against the two defendants. Upon application to set aside the verdict on the ground that the statute would not support such a joint action, the plaintiff was put to his election to retain his judgment against either defendant, undertaking to enter a *nolle prosequi* against the other.

MEREDITH, C.J., *hesitante*. *Crane v. Hunt and Wayper*, 641.

Sale of Quantity.—See JUSTICE OF THE PEACE, 1.

ISSUE.

Failure of, Meaning.—See WILL, 1.

JUDGMENT.

1. *Foreign Judgment—Action on—Defence—False Affidavit—Fraud—Court of Appeal in England—Decision of—Authority—Practice—Reply—Demurrer—Rules 403, 1322.*—To an action on a foreign judgment the defendants pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the Court the true nature of the transactions between them and the defendant :—

Held, a good defence.

Abouloff v. Oppenheimer, 10 Q. B. D. 295, and *Vadala v. Lawes*, 25 Q. B. D. 310, followed in preference to the decision of the Court of Appeal for Ontario in *Woodruff v. McLennan*, 14 A. R. 242, in accordance with the expression of opinion of the Judicial Committee of the Privy Council in *Trimble v. Hill*, 5 App. Cas. 342, that a colonial court should follow the decisions of the Court of Appeal in England.

To the above defence, the plaintiffs, after the coming into force of Rule 1322, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum :—

Held, that this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence ; and to such a replication Rule 403 had no application. *Hollender et al. v. Ffoulkes*, 61.

2. *Foreign Judgment—Merger—Right to Sue on Original Cause of Action.*—A foreign judgment is not a merger of the original cause of

action, which may, notwithstanding such judgment, be sued on in this Province. *Trevelyan et al. v. Myers*, 430.

3. *Action to Establish Will—Decree Establishing "Subject to Dower"—Right to Assignment—R. S. O. ch. 56, sec. 7—Real Property Limitation Act, R. S. O. ch. 111, sec. 25.*—In an action by a devisee to establish a destroyed will devising real estate, to which the plaintiff, the widow of the testator was a defendant, she, although she pleaded to the action, did not claim to be entitled to or to recover her dower in the land of which the action also sought to deprive her, and a decree was made declaring that the devisee, one of the defendants hereto was entitled to the land in fee simple, subject to the dower of the plaintiff herein :—

Held, not such a judgment as entitled the dowress to sue out a writ of assignment of dower under section 7 of R. S. O. ch. 56 :—

Held, also, that the decree did not prevent the running of sec. 25 of "The Real Property Limitation Act," R. S. O. ch. 111, so as to bar the remedy of the plaintiff. *Cope v. Cope et al.* 441.

Effect of, Against Company without Leave of the Court after Wind-up Order Made.—See SALE OF GOODS.

Effect of, Against Partners when Judgment Against the Firm.—See DIVISION COURTS, 3.

JURISDICTION.

Of High Court in Respect to Letters of Administration Granted by Surrogate Court.—See HIGH COURT OF JUSTICE.

Of Superintendent-General of Indians.—See INDIANS.

Territorial, of Justice of the Peace.—See JUSTICE OF THE PEACE, 2.

See DIVISION COURTS.

JURY.

Improperly Influencing.—See NEW TRIAL.

Right to, in Division Court.—See DIVISION COURTS, 1.

JUSTICE OF THE PEACE.

1. *Summary Conviction—Sale of Intoxicating Liquors—Quantity—R. S. O. ch. 194, sec. 2, sub-sec. 3—Finding of Magistrate—Power to Review—Certiorari.*—The defendant, the holder of a shop license under the Liquor License Act, R. S. O. ch. 194, was convicted by a magistrate for selling liquor in less quantity than three half-pints, contrary to sec. 2, sub-sec. 3. The evidence shewed a sale of a bottle of ale and a flask of brandy, each containing less than three half-pints, the two together containing more than three half-pints.

Upon appeal from an order refusing a *certiorari* :—

Held, that it was within the jurisdiction of the magistrate to determine as a matter of fact whether the defendant had sold liquor in less quantity than three half-pints, and if a *certiorari* were granted, the Court would have no power, upon a motion to quash the conviction, to review the magistrate's decision.

Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, followed. *Regina v. Cunerty*, 51.

2. *Territorial Jurisdiction—Summary Conviction—Warrant—Evidence—Criminal Code, sec. 889—Costs of Warrant—Criminal Code, secs. 559, 843—Exclusion of Evidence—Criminal Code, sec. 850.*—Upon a motion for a rule *nisi* to quash a summary conviction of the defendant by a stipendiary magistrate for selling liquor without a license:—

Held, that although the conviction did not shew on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon *certiorari*, shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore the conviction should not, having regard to sec. 889 of the Criminal Code, 1892, be held invalid.

Regina v. Young, 5 O. R. 184a, distinguished:—

Held, also, that, by the combined effect of secs. 559 and 843 of the Code, it was discretionary with the magistrate to issue either a summons or a warrant, as he might deem best; and therefore it was not a valid objection to the conviction that the magistrate included in the costs which the defendant was ordered to pay, the costs of arresting and bringing her before the magistrate under the warrant.

Upon the defendant tendering herself as a witness on her own behalf, the magistrate stated that, in view of the evidence adduced by the

prosecutor, a denial by the defendant on oath would not alter his opinion of her guilt, upon which her counsel did not further press for her examination; but her husband was examined, and gave evidence denying the sale of the liquor:—

Held, that there was no denial of the right of the defendant, under sec. 850 of the Code, to make her full answer and defence. *Regina v. McGregor*, 115.

3. *Jurisdiction—Trespass—Railway—Arrest—51 Vict. ch. 29, sec. 283 (D.).*—Section 283 of the Railway Act of Canada, 51 Vict. ch. 29, enabling a justice of the peace for any county to deal with cases of persons found trespassing upon railway tracks, applies only where the constable arrests an offender and takes him before the justice.

A summary conviction of the defendant by a justice for the county of York, for walking upon a railway track in the city of Toronto, was quashed where the defendant was not arrested, but merely summoned. *Regina v. Hughes*, 486.

4. *Provincial Fisheries—Jurisdiction—Prosecution for Penalty Exceeding \$30—55 Vict. ch. 10 (O.), secs. 19, 25, 26.*—The defendant was convicted before one justice of the peace on an information under 55 Vict. ch. 10, sec. 19 (O.), charging him with fishing in a certain stream without the permission of the proprietors, and of taking therefrom forty-five fish:—

Held, that the conviction must be quashed, for the penalty fixed for the offence charged exceeded \$30, and, therefore, under sections 25 and 26 of the Act, the prosecution should have been before a stipendiary or police magistrate or two or more

justices of the peace, or one justice and a fishery overseer.

Only one offence is created by section 19, that of fishing in prohibited waters, and that offence is complete though no fish be taken. *Regina v. Plows*, 339.

5. *Summary Conviction—Interest—Bias—Relationship to Complainant—Costs.*—Where the convicting justice was the son of the complainant, and the latter was entitled to one-half of the penalty imposed, a summary conviction was quashed, on the ground that the justice had such an interest as made the existence of real bias likely, or gave ground for a reasonable apprehension of bias, although there was no conflict of testimony.

The Queen v. Huggins, [1895] 1 Q. B. 563, followed.

Dictum of ROSE, J., in *Regina v. Langford*, 15 O. R. 52, approved.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *Regina v. Steele*, 540.

LANDLORD AND TENANT.

1. *Fixtures—Short Forms Act, R. S. O. ch. 106—Forfeiture—Assignment for Benefit of Creditors—R. S. O. ch. 143, sec. 11—Notice—Re-entry—Election—Removal of Fixtures Time—Interference—Remedy.*—The term "fixtures" as used in the extended form of the covenants to repair and leave the premises in good repair in a lease made pursuant to the Short Forms Act, R. S. O. ch. 106, includes only irremovable fixtures, which are such things as may

be affixed to (*e.g.*, doors and windows) or placed on (*e.g.*, rail fences) the freehold by the tenant, the property in which passes to the landlord immediately upon their being so affixed or placed, and in which the tenant at the same time ceases to have any property; and does not include removable fixtures, which are such things as may be affixed to the freehold for the purposes of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, or such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant.

The provisions of sec. 11 of R. S. O. ch. 143 do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is therefore enforceable without notice served upon the lessees.

Where the lessor has elected to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purposes of his trade, and has a reasonable time after such election within which to do so.

And where he attempts to do so within a reasonable time, and is prevented by the lessor, the latter is liable to an action for the value.

Judgment of BOYD, C., reversed. *Argles v. McMath*, 224.

2. *Covenant to Pay Taxes—Construction of—Right of Building over Lane—Interest in Land.*—A lessee covenanted, pursuant to the Short Form of Leases Act, to pay all taxes

"to be charged upon the said demised premises or upon the said lessor on account thereof." The premises consisted of a building with a lane to the rear, described as being "north of the premises hereby demised" over which the lease provided that the lessee might at any time erect a building or extension provided the same was always nine feet above the ground, and in accordance with which the lane was built over. The lease also provided that if the lessors elected not to renew, they were to pay a fair valuation for the buildings, which should at that time be erected "on the lands and premises hereby demised and over the said lane":—

Held, that the words "demised premises" in the covenant referred only to the building lot itself, and not to the interest in the lane which passed by the lease.

Semble, where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or that of the landlord to resort to the Court of revision to have the omission rectified would not relieve him from his obligation:—

Held, also, that the interest of the defendants in the lane was clearly an interest in land.

And *semble*, even if it were not separately assessable, this would not excuse defendants from repaying the lessor what he had to pay for taxes in respect to it. *Janes v. O'Keefe*, 489.

LANDS.

Injuriouslly Affected by Approaches to Bridges.—See ARBITRATION AND AWARD, 1.

LEGACY.

Annual Specific Sum.—See WILL, 2.

To "Poor of County."—See WILL, 3.

To Widow in Lieu of Dower.—See WILL, 2.

LICENSE COMMISSIONERS.

Will not be Prohibited from Issuing a License.—See PROHIBITION.

LICENSE.

Application for under sec. 21, R. S. O. ch. 194.—See PROHIBITION.

Of Building in Park.—See NEGLIGENCE, 2.

LIEN.

Mechanics' Lien—Prior Mortgage—Jurisdiction of Master under 53 Vict. ch. 37.—Under the "Act to simplify proceedings for enforcing Mechanics' Liens," 53 Vict. ch. 37 (O.), the remedy of a lien holder as against a mortgagee is confined to the increased value provided by sec. 5 sub-sec. 3 of R. S. O. ch. 126, and he cannot question the priority of the mortgage.

The name of the town and county in which a lien holder resides is a sufficient address under sec. 11 of 56 Vict. ch. 24 (O.). *Dufton v. Horning*, 252.

See MECHANICS' LIEN.

LIFE INSURANCE.

See INSURANCE.

LIQUOR.

Conviction for Selling.]—See JUSTICE OF THE PEACE, 1, 2.

LIQUOR LICENSE ACT.

1. *Sale by Wife—Presumption—Rebuttal—Criminal Code, sec. 13.*]

—The defendant was a married woman, and the sale of the liquor took place in the presence of her husband; but the evidence shewed that she was the more active party, and she was the occupant of the premises on which the sale took place:—

Held, having regard to R. S. O. ch. 194, sec. 112, sub-sec. 2, that, even if the presumption that the sale was made through the compulsion of the husband had not been removed by section 13 of the Code, it would have been rebutted by the circumstances.

Regina v. Williams, 42 U. C. R. 462, distinguished. *Regina v. McGregor*, 115.

2. *R. S. O. ch. 194, secs. 50, 108, 112—Keeping Liquor for Sale, etc.—Manager of Club—Liability.*]

Section 50 of the Liquor License Act, R. S. O. ch. 194, which forbids the keeping or having in any house, etc., any liquors for the purpose of selling by any person unless duly licensed thereto under the provisions of the Act, does not justify a conviction of the manager of a club incorporated under Ontario Joint Stock Companies Letters Patent Act who has the charge or control of the liquor merely in his capacity of manager, the act of keeping, etc., being that of the club and not of the manager.

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Regina v. Charles, 24 O. R. 432, distinguished. *Regina v. Slattery*, 148.

See JUSTICE OF THE PEACE, 1, 2.

LOCAL IMPROVEMENT.

See ASSESSMENT AND TAXES.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAINTENANCE.

Gift of Board and Lodging—Charge on Land—Right of Occupation—Duration of.]—A father conveyed to one of his sons certain farm lands, subject to his own life estate therein, and subject also to the use by another son, the plaintiff, of a bed, bed-room and bedding, in the dwelling house on the farm, and to his board so long as the plaintiff should remain a resident on the farm:—

Held, that the plaintiff took no estate under the deed, but merely the use, after the termination of the father's life estate, and while resident on the land, of the bed-room and board, which was a charge thereon; that no period was fixed for such occupation, which might be either permanent or temporary, and therefore no forfeiture was created by non-occupation. *Wilkinson v. Wilson*, 213.

MALICIOUS PROSECUTION.

Record of Acquittal—Necessity for Production of—Admissions on Examination for Discovery.]—In an

action for malicious prosecution, the indictment, with an endorsement thereon of the acquittal of the plaintiff of the criminal charge of which he had been prosecuted, was produced by the clerk of the Court, having been sent to him by the registrar of the Queen's Bench Division to whom the indictment had been returned and which he had been subpoenaed by the plaintiff to produce, the Court being informed that the Attorney-General had refused his *fiat* to enable a record of acquittal to be made up. The defendant's counsel objected to the admission of the indictment, and its admission was refused:—

Held, that the indictment so endorsed and produced was not, under the circumstances, sufficient evidence of the termination of the prosecution, but that the formal record of acquittal should have been produced; and that no such record, or a copy thereof, could be obtained without a *fiat* of the Attorney-General.

Quære, whether the termination of such prosecution can be proved by admissions made by the defendant on his examination for discovery. *Hewitt v. Cane*, 133.

MANDAMUS.

Unsealed Ballot Papers.]—See MUNICIPAL ELECTIONS, 1.

MARRIED WOMAN.

As a Contractor.]—See HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

1. *Negligence—Defect in "Way"*—*Public Street*—55 Vict. ch. 30, secs. 3, 6.]—A public street in a defective

condition, used by an employer in connection with his business is not a "way used in the business of the employer" within the meaning of 55 Vict. ch. 30, sec. 3 (O.).

The defendants' factory was built immediately on the line of a public street which was fourteen feet wide at the place, and on the other side there was a steep declivity, without a fence. One of their workmen was on a load of straw on a waggon unloading it into the defendants' premises through an aperture facing the street, when he lost his balance, fell off, and down the declivity, and was killed:—

Held, that the defendants were not liable. *Stride v. The Diamond Glass Company*, 270.

2. *Negligence—Fellow-Servant—Liability at Common Law—Defective Appliances.*]—One of the directors of a quarry company, was appointed foreman of the works, with full powers of management, subject to the directors' control, and to such duties as might be delegated to him from time to time. The plaintiff, one of the company's labourers, claiming that he had sustained injury by reason of the foreman's negligence while acting under his instructions, brought an action at common law against the company:—

Held, so far as the action rested upon the liability of the company through the foreman, that there was no liability, as he was merely a fellow-servant of the plaintiff:—

Held, however, that an action might be sustained on proof of negligence of the company in not furnishing proper appliances for the quarrying operations. *Fairweather v. The Owen Sound Stone Quarry Company*, 604.

MECHANICS' LIEN.

Money Paid into Court on, Ceases to be the Money of the Party paying it in.—See PAYMENT.

See LIEN.

MORTGAGE.

1. *Sale of Equity of Redemption—Mortgage of, to Mortgagee—Right of First Mortgagor to Assignment.*—Where the plaintiff, the mortgagor of certain lands sold the same for a sum in excess of the amount of his mortgage, the purchaser raising such excess by a mortgage to the defendant, the original mortgagee, the plaintiff was held entitled to an assignment of the mortgage made by him on his paying the defendant merely the amount due thereon. *Wheeler v. Brooke*, 96.

2. *Redemption—Right to Assignment—Right to Reconveyance—R. S. O. ch. 102, sec. 2.*—The plaintiffs being mortgagees in possession of certain lands afterwards acquired by transfer a second mortgage on the same property, and sued the covenantors in the first mortgage, who had parted with the equity of redemption before the second mortgage was given, and who demanded a reconveyance upon payment of the amount of the first mortgage subject to equities of redemption existing in other parties:—

Held, that the defendants were entitled to this, and that the plaintiffs could not tack the amount of the second mortgage to the first and require payment of both.

Kinnaird v. Trollope, 39 Ch. D. 636, followed.

The defendants before action tendered, with the amount due on the

first mortgage, an assignment thereof, which the plaintiffs being mortgagees in possession were not bound and declined to give, under R. S. O. ch. 102, sec. 2, and subsequently but without tender the defendant offered to take a reconveyance:—

Held, that the plaintiffs' claim to consolidate was not misconduct so as to deprive them of their costs of the action.

Decision of STREET, J., varied upon the question of costs. *Stark v. Reid*, 257.

As a Debt within 13 Eliz. ch. 5.—See FRAUDULENT CONVEYANCE—DOWER.

Dower in Lands when Sold by Mortgagee.—See DOWER.

Of Dwelling-house covering Furnace.—See FIXTURES.

Priority of, Cannot be Questioned by Lien-holder.—See LIEN.

Right to Sue for Interest only.—See DIVISION COURTS, 2, 6.

Right to Recover Interest in Division Court after Maturity of Mortgage.—See DIVISION COURTS, 2.

MORTGAGOR AND MORTGAGEE.

Mortgagee as Creditor within 13 Eliz. ch. 5.—See FRAUDULENT CONVEYANCE.

Rights of Under Railway Act of Ontario, when Lands Taken.—See RAILWAYS, 1.

MORTMAIN ACT.

See WILL, 4.

MUNICIPAL CORPORATIONS.

1. *Removal of Clerk—Resolutions therefor—Sufficiency of—Seal.*—The removal of a clerk of a municipal corporation may be by a resolution, it not being essential that a by-law should be passed for such a purpose.

Vernon v. Corporation of Smith's Falls, 21 O. R. 331, followed.

When the seal of a municipal corporation is wrongfully detained by the clerk of the council a by-law removing him from office may be sealed with another seal *pro hac vice*. *The Corporation of the Village of London West v. Bartram*, 161.

2. *Public Parks Act—Purchase Money for Lands Taken—Liability for—Agency of Board for Corporation—R. S. O. ch. 190.*—Where a municipality adopts the "Public Parks Act," R. S. O. ch. 190, and proceedings are regularly taken thereunder for the formation of the board of park management and for the doing of the various matters authorized to be done thereby, including the purchase by the board of lands needful for park purposes, such board becomes the statutory agent of the municipality for such purchase, and the municipality and not the board is liable to pay for the lands. The purchase money may be raised by a special issue of debentures under section 17, sub-section 4 of the Act, or may be paid out of the general funds of the municipality, which is liable to pay whether the debentures specially issued have been sold or not.

Decision of ROBERTSON, J., reversed. *McVicar v. The Corporation of the Town of Port Arthur*, 391.

3. *Construction of Sidewalk—"Desirable in the Public Interest"—Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 623b.*—Persons who will be affected by proceedings under section 623b of the Consolidated Municipal Act, 1892, for the construction of sidewalks, are entitled to actual notice thereof, and to be permitted to shew, if they can, that the proposed sidewalk is not desirable in the public interest; and where such notice had not been given, except by advertisement in a newspaper, which had not come to the attention of the applicant, the by-law for the construction of the sidewalk was quashed, so far as it purported to affect his property. *In re Hodgins and the Corporation of the City of Toronto*, 480.

4. *Municipal Debt—Special Rate—Wrongful Diversion of Fund—Disqualification—55 Vict. ch. 42, sec. 373 (O.).*—No special appropriation is necessary in order to create a special rate applicable to payment of principal and interest of a municipal debt; if the provisions of the Municipal Act are observed such separate rate, and the sinking fund as part of it, arise as the taxes are collected; and where, no such appropriation having been made, one of the municipal council voted for defraying certain of the current expenses of the municipality out of the amount attributable to that fund, his election as reeve was set aside, and he was declared disqualified from any municipal office for a period of two years pursuant to 55 Vict. ch. 42, sec. 373.

When without any such appropriation so much of the year's income of the municipality has been expended as to leave no more than sufficient to cover such sinking fund, the

balance is impressed with that character and to apply it otherwise is a diversion within the meaning of the above enactment. *Regina ex rel. Cavanagh v. Smith*, 632.

5. *Drainage By-law—Obligations of Initiating and Contributory Townships respectively — Consolidated Municipal Act, 1892—55 Vict. ch. 42, secs. 569, 579, 580, and 585 (O.).*

—Where a township municipality passed a by-law, purporting to be under sec. 585 of the Consolidated Municipal Act, 1892, for the purpose of making certain alterations and improvements in a drain, and served an adjoining municipality, which was to be benefited by the work, with a copy of the engineer's report, etc., shewing the sum required to be contributed by the latter, as directed by sec. 579, and the by-law of the initiating township was irregular and invalid:—

Held, per MEREDITH, C. J., the contributory township was nevertheless not only entitled, but bound, within the four months prescribed by sec. 580, to pass the necessary by-law to raise their share of the estimated cost:—

Held, per ROSE, J., the contributory township could not be required to pass a by-law raising its share until the initiating municipality had passed a valid by-law adopting the report providing for the doing of the work, including, provisionally, measures for the raising of its proportion of the funds:—

Held, per MACMAHON, J., the contributory township had no power to pass a by-law for raising its share of the proposed expenditure until the initiating municipality had passed its by-law for the construction of the works:—

Held, however, MACMAHON, J.,

hesitante, that in this case the portion of the by-law of the initiating township providing for the construction of the work was a sufficient compliance with sec. 569, and severable from the other portion of it, providing for the raising of the funds.

Where the council for one municipality assumed under the supposed authority of 55 Vict. ch. 42, sec. 585 (O.), in a by-law for the improvement of a drain, to assess lands of the plaintiff situated in another municipality:—

Held, that such assessment was wholly nugatory and void and the plaintiff could not be bound by it, and was therefore not entitled to a declaration declaring it illegal and invalid. *Broughton v. The Municipal Corporation of the Township of Grey et al.*, 694.

See MUNICIPAL ELECTIONS—NEG-
LIGENCE, 2.

MUNICIPAL ELECTIONS.

1. *Mandamus—County Judge—Recount of Ballot Papers—55 Vict. ch. 42, secs. 155, 175 (O.).*—A mandamus was refused to compel a County Judge to proceed with a recount where the ballot papers cast at a municipal election were not sealed up as provided by section 155 of 55 Vict. ch. 42 (O.). *Re Ottawa Municipal Election — By Ward—Rideau Ward*, 106.

2. *Municipal Corporations—Bribery—Agents—Quo Warranto—Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.) secs. 209-13.*—A person cannot be found guilty of bribery under secs. 209-13 of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42 (O.), unless the evi-

dence discloses in him an intention to commit the offence. A candidate desiring and intending to have a pure election cannot be made a *quasi* criminal by the act of an agent who, without the knowledge or desire of the principal, violates the statute to advance the election of such candidate.

Municipal elections are not avoided for bribery of agents without authority where the candidate has a majority of votes cast. *Regina ex rel. Thornton v. Dewar*, 512.

3. *Quo Warranto* — *Election of Deputy Reeve—Irregular Addition of Names to Voters' List—Quashing Election—55 Vict. ch. 42 (O.), secs. 175 and 191.*—An election, though by a majority of sixty-six votes, of deputy-reeve of a municipality, who had participated in a transaction by which before polling day some eighty names were added to the voters' list over and above those certified by the Judge to be properly there was quashed, although only some thirty-one of those illegally added cast votes, notwithstanding 55 Vict. ch. 42 (O.), sec. 175, which provides that no election shall be invalid for want of compliance with the principles of the Act when the result is not affected.

The meaning of 55 Vict. ch. 42 (O.), sec. 191, is that cases which have so much in common that they can conveniently be tried together, may be combined in one proceeding. *The Queen ex rel. St. Louis v. Reaume et al.*, 460.

NEGLIGENCE.

1. *Railways—Contributory Negligence—Settlement before Action—Payment—Receipt—Evidence—Accord and Satisfaction—Release—Estoppel—Nonsuit.*—In an action

for damages for negligence, whereby the plaintiff was injured in alighting from a train, the defendants denied negligence and pleaded contributory negligence, and also a payment of \$10 to the plaintiff before action and a receipt in writing signed by him therefor, "in lieu of all claims I might have against said company on account of an injury received * *

* by reason of my stepping off a train * * * ; such act being of my own account, and not in consequence of any negligence or otherwise on behalf of such railway company or any of its employees." The plaintiff replied that if he signed the receipt, he was induced to do so by fraud and undue influence:—

Held, that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence, and should have been submitted to the jury, and not separately tried by the Judge.

Johnson v. Grand Trunk R. W. Co., 25 O. R. 64, 21 A. R. 408, distinguished.

The document would not support a plea of accord and satisfaction, nor of release, nor did it operate by way of estoppel.

Judgment of STREET, J., reversed. *Haist v. Grand Trunk Railway Company*, 19.

Judgment of STREET, J., restored in appeal.

2. *Municipal Corporations—Public Park—Licensee—Knowledge.*—A municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries sustained owing to want of repair of the building, at all events where knowledge of the want of repair is not shewn. *Schmidt et ux. v. Town of Berlin*, 54.

3. *Street Railway Company—Right of Way—Duty to Sound the Gong.*—A car of the defendants' electric street railway was moving very quickly along a down grade on a street in a city where the plaintiff, who was in the employment of the city corporation, was engaged in his duty of sweeping the road-bed. The motorman did not sound the gong on the car, as was customary, and ran into the plaintiff, injuring him :—

Held, that although the defendants had the right of way, the omission to sound the gong or give any warning of the approach of the car was actionable negligence. *Green v. The Toronto Railway Company*, 319.

See MASTER AND SERVANT, 1, 2—RAILWAYS, 3.

NEW TRIAL.

In Garnishment Cases in Division Court.—See DIVISION COURTS, 5.

Jury—Improperly Influencing—Treating to Drink.—Where the plaintiff during the trial had conversation with members of the jury upon the subject of his case, and his brother and also his solicitor had treated some of them to “drinks” during the recess of the Court, the verdict in plaintiff's favour was set aside, and a new trial ordered. *Stewart v. Woolman*, 714.

NOTICE.

Of Proposed Municipal Work.—See MUNICIPAL CORPORATIONS, 3.

Of Action to Public Officer.—See ARREST—DEFAMATION.

PARLIAMENTARY ELECTIONS.

Ontario Election Act, 55 Vict. ch. 3, sec. 186—Deputy Returning Officer—Refusal of Vote—“Wilful” Misfeasance—Penalty.—In an action against a deputy returning officer by a “person aggrieved,” to recover a penalty under sec. 186 of the Ontario Election Act, 55 Vict. ch. 3, for an alleged wilful refusal to allow the plaintiff to vote :—

Held, that the word “wilful” in the section means “perverse” or “malicious;” and, although the plaintiff was deprived of his vote by the refusal of the defendant to allow him to deposit a “straight” ballot, and there was thereby a contravention of the Act, yet, as the defendant honestly believed the plaintiff was not qualified, and believed in his own power to withhold the ballot, the action failed.

Lewis v. Great Western R. W. Co., 3 Q. B. D. 195, followed.

Walton v. Apjohn, 5 O. R. 65, distinguished. *Johnson v. Allen*, 550.

PAYMENT.

Payment into Court—Effect of—Subsequent Order for Costs—Claim of Set-off.—In a mechanics' lien action a certain sum was found due from the owner to the contractor, and the latter was found indebted to other lienholders. Payment of the former sum into Court was ordered and made, the amount, however, being insufficient to pay the claims of lienholders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into Court :—

Held, that by the payment into Court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten v. Laidlaw*, 189.

POLICY.

Condition of, as to Retaining Solicitor for Defence.]—See CONTRACT.

POSSESSION.

Change of, on Sale of Chattels by Husband to Wife.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

PRINCIPAL AND AGENT.

Agency of Public Parks Board for Municipal Corporations.]—See MUNICIPAL CORPORATIONS, 2.

PRINCIPAL AND SURETY.

1. *Bond — Condition — Breach — Demand — Executors and Administrators — Liability of Sureties.*]—It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal *on demand* of all moneys received and not paid out by him, that a personal demand of payment should be made on him.

And where the principal in a bond so conditioned dies before any demand for payment is personally made on him, a demand on his personal representatives is insufficient to charge the sureties. *Port Elgin Public School Board v. Eby et al.*, 73.

2. *Security held by Creditor — Release of same without Consent of Surety — Rights of Surety — Judgment.*]—The plaintiffs, who held a number of promissory notes of a customer, endorsed by various parties, and also a mortgage from the customer on certain lands to secure his general indebtedness, sued the defendant as endorser of one of the notes. Before action brought, they had released certain of the mortgaged lands, without the consent of the defendant:—

Held, that the plaintiffs were entitled to judgment against the defendant for the amount of the note, but without prejudice to the right of the latter to make them account for their dealings with the mortgaged property when that security had answered its purpose, or the debt had been paid by the sureties, or when in any other event the application of the moneys from the security could be properly ascertained.

Decision of ROBERTSON, J., 25 O. R. 503, modified. *Molsons Bank v. Heilig*, 276.

PROHIBITION.

License Commissioners — R. S. O. ch. 194, sec. 21.]—A board of license commissioners under the Liquor License Act R. S. O. ch. 194, is not a body against whom a writ of prohibition will be granted, prohibiting them from issuing a license.

Regina v. Local Government Board, 10 Q. B. D., at p. 321, and *Re Godson and The City of Toronto*, 16 A. R. 452 followed.

Semble, an application under the latter part of sec. 21 R. S. O. ch. 194, for an additional tavern license in a locality largely resorted to in summer by visitors, may be made at

any time so long as the license does not extend beyond the prescribed period of six months from the first of May. *In the Matter of Milton A. Thomas's License*, 448.

PROMISSORY NOTES.

Made by President of a Company without the Authority of the Directors.—See COMPANY, 2.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROSECUTION.

Evidence of Termination of.—See MALICIOUS PROSECUTION.

PUBLIC PARKS.

See MUNICIPAL CORPORATIONS, 2.

PUBLIC SCHOOLS.

1. *High Schools—Vacancy in Board of Trustees—Appointment to Fill Vacancy*—54 Vict. ch. 57, secs. 11, 12 (O.).—In a high school board of a high school district constituted under sec. 11 of 54 Vict. ch. 57 (O.), a vacancy occurred by reason of the expiration of the term of office of one of the trustees appointed by a town, whereupon the town council passed a by-law appointing the plaintiff to fill the vacancy. At a subsequent meeting, in the absence of any of the causes provided for by the Act, namely, death, resignation or removal from the district, etc., the council passed a by-law amend-

ing their previous by-law by substituting the name of the defendant for that of the plaintiff:—

Held, that the plaintiff was duly appointed to fill the vacancy, and that he was entitled to the seat, and the subsequent appointment of the defendant was illegal. *Regina ex rel. Moore v. Nagle*, 249.

2. *Readjustment of Boundaries of Union School Sections—Arbitration—Finality of Award*—54 Vict. ch. 55, sec. 88 (O.).—An award of arbitrators under secs. 87-88 of the Public Schools Act, 1891, as to readjustment of union school sections is conclusive for five years, though the award be that no change be made in the boundaries. *In re Union School Section East and West Wawanosh*, 463.

3. *Union School Section—Alteration of—Petition of Ratepayers—Award*—54 Vict. ch. 55, secs. 87, 96 (O.).—The petition for the formation, alteration, or dissolution of a Union School Section under 54 Vict. ch. 55, sec. 87, sub-sec 1 (O.), must be, in all cases, the joint petition of five ratepayers from each of the municipalities concerned, otherwise the award based upon it will be void *ab initio*, and section 96 validating defective awards where there has been no notice to quash given within the time prescribed has no application. When the award in such case is that no action be taken, the restriction in sub-section 11 of section 87 against new proceedings for a period of five years does not apply.

Semble, no appeal lies from such an award as last referred to.

In re Union School Section East and West Wawanosh, ante p. 463, not followed. *Union School Section v. Lockhart*, 662.

QUO WARRANTO.

See MUNICIPAL ELECTIONS, 2.

RAILWAYS.

1. *Compensation for Land Taken*—“Owner”—*Mortgagee—Injurious-ly Affected—R. S. O. ch. 170, sec. 13.*]

—A mortgagor does not represent his mortgagee for purposes of the Railway Act of Ontario, and is not included in the enumeration of the corporations or persons who under sec. 13 of R. S. O. ch. 170, are enabled to sell or convey lands to the company. He can only deal with his own equity of redemption; leaving the mortgagee entitled to have his compensation for lands taken separately ascertained.

Decision of STREET, J., affirmed. *In re The Toronto Belt Line Railway Company*, 413.

2. *Lands Injuriously Affected—Right to Compensation.*—The sections of the Dominion Railway Act, 1888, under the headings “Plans and Surveys” and “Lands and their Valuations,” apply as well to lands “Injuriously Affected,” as to lands taken for the purposes of the railway. It is no answer to a complaint by a landowner, that the company is proceeding, without having taken the necessary steps under these sections, that it has the authority of the railway committee of the Privy Council for the execution of the works.

Corporation of Parkdale v. West, 12 App. Cas. 602, followed:—

Held, also, that a by-law passed by the Municipal Council for granting aid to the railway, and the validating Act, 58 Vict. ch. 68 (O.), did not affect this question. *Hendrie v. The Toronto, Hamilton and Buffalo Railway Company*, 667.

3. *Damage to Goods—Negligence—Evidence of—Conjecture—51 Vict. ch. 29, secs. 226, 246 (D.)—Reduced Rate—Release of Company from Negligence.*—Where the findings of the jury as to the grounds of negligence in an action against a railway company for damage to goods were based on mere conjecture, the verdict for the plaintiffs was set aside, but as it could not be said that there was no evidence of negligence on other grounds, a new trial was directed.

Per MACMAHON, J., dissenting. A presumption of negligence arose from the non-delivery of the goods, and the plaintiffs were not bound to shew any particular acts of negligence.

The plaintiffs’ agent shipped a quantity of plate glass by defendants’ railway, signing an agreement that in consideration of the defendants receiving the goods at a reduced rate of twenty-three cents per 100 pounds they should not be responsible for any damage arising in the course of the transit, including negligence. The defendants had two rates, namely, the twenty-three cents, a third-class rate, and a double first-class rate of sixty cents, which they contended were in accordance with the Canadian Joint Freight Classification, adopted by them and approved by the Governor in Council under sec. 226 of 51 Vict. ch. 29 (D.), “The Railway Act,” the said classification stating that the third-class rate applied where the goods were “shipped at owners’ risk—shipper signing special plate glass release form.” The plaintiffs’ agent was aware of the two rates, and signed the agreement assenting to the lower rate, under the belief that the defendants could not under section 246, take advantage of the provision absolving them from liability where the damage

was occasioned by negligence. No by-laws approving of the company's tariff under which these rates were charged had been approved of by the Governor in Council, although a by-law fixing a first-class rate of sixty-six cents and a third-class rate of fifty cents had *inter alia* been so approved:—

Held, per MEREDITH, C. J., that notwithstanding the payment of the lower rate, and the agreement signed by their agent, the defendants could not, under section 246, relieve themselves from liability when negligence was proved.

Per ROSE, J. The third-class rate was the only rate "lawfully payable." If only one rate is fixed the provision in the freight classification as to release was *ultra vires* as contrary to the provisions of section 246.

Per MACMAHON, J. No by-law fixing the rate at sixty cents having been approved of by the Governor in Council, there was no freight "lawfully payable," without which there could be no alternative rate, and the release which would otherwise have been valid, was inoperative. *Cobban v. The Canadian Pacific Railway Company*, 732.

RAPE.

Acquittal of an Indictment for, no Answer to Action for Seduction.—See SEDUCTION.

RESOLUTION.

Sufficiency of, to Remove Municipal Clerk.—See MUNICIPAL CORPORATIONS, 1.

RULES.

Con. Rule, 403.—See JUDGMENT,

1.

Con. Rule, 585.—See INSURANCE,

1.

Con. Rule, 1005.—See DEVOLUTION OF ESTATES ACT, 3.

Con. Rule, 1322.—See JUDGMENT, 1.

SALE OF GOODS.

Action—Mistake of Vendor as to Identity of Vendee—Fraud—Judgment—Vacating Judgment Against Supposed Vendee—Action Against True Vendee—Proceedings Without Leave after Winding-up Order—Nullity—*R. S. C. ch. 129, sec. 16.*—A manufacturing company transferred to a syndicate, which had lent it money, its works, plant, and material, and in effect its whole business, which the syndicate proceeded to carry on, on the company's premises, for its own benefit, and at its own risk. The managing director of the company, who had become the manager of the syndicate, after the above transfer, but pursuant to a correspondence commenced a few days before it, ordered as in his former capacity certain goods from the plaintiff, who subsequent to the transfer supplied the goods ordered which were used by the syndicate, and he afterwards took a note of the company for their price, on which when dishonoured he sued and obtained judgment against the company, being, however, all the time, ignorant of the circumstances above mentioned. About a week prior to the judgment a winding-up order was obtained against the company,

hearing of which the plaintiff at once commenced this action against the syndicate for the price of the goods, and afterwards before trial he obtained *ex parte* an order vacating the judgment against the company:—

Held, that the plaintiff was entitled to recover from the syndicate the price of the goods:—

Held, also, *per* ROBERTSON, J., that the judgment vacated was absolutely null and void, having been obtained after the winding-up order without the leave of the Court.

Per MEREDITH, J., the judgment was at any rate irregularly entered, and when set aside, was as if it had never existed. *Keating v. Graham*, 361.

Assignee Takes no Higher Rights than his Assignor had.]—See **BILLS OF SALE AND CHATTEL MORTGAGES**, 2.

Priority of Sale of Book Debts.]—See **BILLS OF SALE AND CHATTEL MORTGAGES**, 2.

SALE OF LANDS.

Assignee for Creditors—Sheriff—Statute of Frauds—Memorandum in Writing—Purchase of Equity of Redemption.]—A sheriff, selling lands as assignee for creditors, under R. S. O. ch. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre v. Faubert*, 427.

By Administrator.]—See **DEVOLUTION OF ESTATES ACT**, 3—**VENDOR AND PURCHASER**.

Dower in Land when Sold by Mortgagee.]—See **DOWER**.

For Taxes.]—See **ASSESSMENT AND TAXES**, 3.

To Railway, Rights of Mortgagor and Mortgagee.]—See **RAILWAYS**, 1.

SALE OF LIQUOR.

Keeping Liquor for Sale by Manager of a Club.]—See **LIQUOR LICENSE ACT**, 2.

SEAL.

Of Municipal Corporation, Substitute for when Wrongfully Detained.]—See **MUNICIPAL CORPORATIONS**, 1.

SEDUCTION.

Action for Connection by Force—Previous Acquittal for Rape—Amendment—Surprise.]—In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connection with by force and against her will, and consequent loss of service. No application was made by the defendants to put in further evidence, nor was any suggestion made that they were in any way prejudiced by the amendment:—

Held, that the amendment was properly allowed:—

Held, also, that the fact of the defendants having been previously acquitted on an indictment for rape on the plaintiff's daughter was not a bar to the action. *Cole v. Hubble*, 279.

SESSIONS.

Public Health — Conviction under By-law in Schedule—Right to Appeal to Sessions—R. S. O. ch. 205.]

—Where there is a conviction for an offence under the by-law set out in the schedule to the Public Health Act, R. S. O. ch. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the Sessions, notwithstanding sec. 112, which has no application. *The Queen v. Coursey*, 685.

SETTLEMENT.

Voluntary.] — See FRAUDULENT CONVEYANCE.

SLANDER.

See DEFAMATION.

SOLICITOR.

Right of Insurance Company to Retain Solicitor Under Condition in Policy.]—See CONTRACT, 1.

Right when a Director to Set-off Profit Costs Against Liability as a Shareholder in Winding-up Proceedings.]—See COMPANY, 1.

STATUTES.

1. *Drainage and Watercourses Act, 1894—57 Vict. ch. 55, sec. 22, sub-sec. 6 (O.)—R. S. O. ch. 220, sec. 11, sub-sec. 5—Directory.]—The provisions of sub-sec. 6 of sec. 22 of 57 Vict. ch. 55 (O.) the Ditches and Watercourses Act, 1894, which require the Judge of the County Court*

to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory. Re McFarlane v. Miller et al., 516.

2. *Repeal of an Act—Exception—Interpretation Act—Effect of—Consolidated Municipal Act, 1892, 55 Vict. ch. 42, sec. 533a (O.)—57 Vict. ch. 50, sec. 14 (O.).]—The saving provisions of sec. 14 of The Municipal Amendment Act, 1894, 57 Vict. ch. 50 (O.), do not operate so as by implication necessarily to exclude the application of the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 43, and*

A township corporation which had obtained an award against a county corporation under sec. 533a of the Consolidated Municipal Act, 1892, for part of the cost of the maintenance of certain bridges were, notwithstanding the repeal of sec. 533a by sec. 14 of 57 Vict. ch. 50 (O.), held entitled to recover the amount expended on the same up to the date of the passing of the latter Act. The Corporation of the Township of Morris v. The Corporation of the County of Huron, 689.

13 Eliz. ch. 5.]—*See FRAUDULENT CONVEYANCE.*

43 Vict. ch. 28, secs. 16-20 (D.).]—*See INDIANS.*

R. S. C. ch. 43.]—*See INDIANS.*

R. S. C. ch. 62, sec. 33.]—*See COPYRIGHT.*

R. S. C. ch. 109, sec. 32.]—*See WILL, 1.*

R. S. C. ch. 129, sec. 16.]—*See SALE OF GOODS.*

R. S. O. ch. 1, sec. 8, sub-sec. 24.]—*See EVIDENCE.*

R. S. O. ch. 1, sec. 8, sub-sec. 43.]—*See STATUTES, 2.*

- R. S. O. ch. 35.]—*See* WILL, 4.
- R. S. O. ch. 44, sec. 29.]—*See* ALI-MONY.
- R. S. O. ch. 44, secs. 85, 86.]—*See* INTEREST.
- R. S. O. ch. 51, sec. 69, sub-secs. 2, 3.]—*See* DIVISION COURTS, 4.
- R. S. O. ch. 51, sec. 77.]—*See* DIVISION COURTS, 2, 6.
- R. S. O. ch. 51, sec. 154.]—*See* DIVISION COURTS, 1.
- R. S. O. ch. 51, secs. 173-199.]—*See* DIVISION COURTS, 5.
- R. S. O. ch. 56, sec. 7.]—*See* JUDGMENT, 3.
- R. S. O. ch. 61, sec. 10.]—*See* EVIDENCE.
- R. S. O. ch. 73.]—*See* ARREST.
- R. S. O. ch. 102, sec. 2.]—*See* MORTGAGE, 2.
- R. S. O. ch. 106.]—*See* LANDLORD AND TENANT, 1.
- R. S. O. ch. 108, sec. 6.]—*See* DEVOLUTION OF ESTATES ACT, 1.
- R. S. O. ch. 108, sec. 8, sub-sec. 1.]—*See* DEVOLUTION OF ESTATES ACT, 3.
- R. S. O. ch. 109, sec. 36.]—*See* WILL, 2.
- R. S. O. ch. 111, sec. 25.]—*See* JUDGMENT, 3.
- R. S. O. ch. 111, sec. 35.]—*See* WATER AND WATERCOURSES, 1.
- R. S. O. ch. 122, secs. 6-13.]—*See* CHOSE IN ACTION.
- R. S. O. ch. 124.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2—SALE OF LANDS.
- R. S. O. ch. 124, secs. 612, 623.]—*See* ASSESSMENT AND TAXES, 1.
- R. S. O. ch. 125.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1, 2.
- R. S. O. ch. 126, sec. 5, sub-sec. 3.]—*See* LIEN.
- R. S. O. ch. 136.]—*See* INSURANCE, 4.
- R. S. O. ch. 136, sec. 6 (1).]—*See* INSURANCE, 2.
- R. S. O. ch. 137.]—*See* WILL, 5.
- R. S. O. ch. 143, sec. 11.]—*See* LANDLORD AND TENANT, 1.
- R. S. O. ch. 159, secs. 2, 87, 157.]—*See* WAY, 1.
- R. S. O. ch. 159, secs. 99, 145.]—*See* WAY, 2.
- R. S. O. ch. 167.]—*See* INSURANCE, 4.
- R. S. O. ch. 170, sec. 13.]—*See* RAILWAYS, 1.
- R. S. O. ch. 190, sec. 17, sub-sec. 4.]—*See* MUNICIPAL CORPORATIONS, 1.
- R. S. O. ch. 193.]—*See* ASSESSMENT AND TAXES, 3.
- R. S. O. ch. 193, sec. 119.]—*See* ASSESSMENT AND TAXES, 1.
- R. S. O. ch. 194, sec. 2, sub-sec. 3.]—*See* JUSTICE OF THE PEACE, 1.
- R. S. O. ch. 194, sec. 21.]—*See* PROHIBITION.
- R. S. O. ch. 194, secs. 50, 108, 112.]—*See* LIQUOR LICENSE ACT, 2.
- R. S. O. ch. 194, sec. 112, sub-sec. 2.]—*See* LIQUOR LICENSE ACT, 1.
- R. S. O. ch. 194, sec. 122.]—*See* INTOXICATING LIQUORS.
- R. S. O. ch. 205, sec. 112.]—*See* SESSIONS.
- R. S. O. ch. 215, secs. 2, 3, 6, 20 and 21.]—*See* DISTRESS.
- R. S. O. ch. 219, sec. 3.]—*See* FENCES.
- R. S. O. ch. 220, sec. 11, sub-sec. 5.]—*See* STATUTES, 1.
- 51 Vict. ch. 22, sec. 2 (O.).]—*See* INSURANCE, 4.

51 Vict. ch. 22, sec. 3 (O.).]—*See* INSURANCE, 2.

51 Vict. ch. 29, secs. 226, 246 (D.).]—*See* RAILWAYS, 3.

51 Vict. ch. 29, sec. 283 (D.).]—*See* JUSTICE OF THE PEACE, 3.

52 Vict. ch. 27 (O.).]—*See* WAY.

52 Vict. ch. 32, sec. 4 (O.).]—*See* INSURANCE, 4.

53 Vict. ch. 37 (O.).]—*See* LIEN.

53 Vict. ch. 39, sec. 6 (O.).]—*See* INSURANCE, 2.

54 Vict. ch. 18 (O.).]—*See* DEVOLUTION OF ESTATES ACT, 2, 3.

54 Vict. ch. 55, secs. 87, 88 (O.).]—*See* PUBLIC SCHOOLS, 2.

54 Vict. ch. 55, secs. 87, 96 (O.).]—*See* PUBLIC SCHOOLS, 3.

54 Vict. ch. 57, secs. 11, 12 (O.).]—*See* PUBLIC SCHOOLS, 1.

55 Vict. ch. 3, sec. 186 (O.).]—*See* PARLIAMENTARY ELECTIONS.

55 Vict. ch. 10, secs. 19, 25, 26 (O.).]—*See* JUSTICE OF THE PEACE, 3.

55 Vict. ch. 20, sec. 3 (O.).]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

55 Vict. ch. 26 (O.).]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2.

55 Vict. ch. 30, secs. 3, 6 (O.).]—*See* MASTER AND SERVANT, 1.

55 Vict. ch. 39, secs. 32, 33 (O.).]—*See* INSURANCE, 3.

55 Vict. ch. 42, secs. 155, 175 (O.).]—*See* MUNICIPAL ELECTIONS, 1.

55 Vict. ch. 42, secs. 175, 191 (O.).]—*See* MUNICIPAL ELECTIONS, 2.

55 Vict. ch. 42, secs. 209-213 (O.).]—*See* MUNICIPAL ELECTIONS, 2.

55 Vict. ch. 42, sec. 373 (O.).]—*See* MUNICIPAL CORPORATIONS, 4.

55 Vict. ch. 42, secs. 391, 530, 532, 535 (O.).]—*See* PROHIBITION, 1.

55 Vict. ch. 42, sec. 533*a* (O.).]—*See* STATUTES, 2.

55 Vict. ch. 42, sec. 623*b* (O.).]—*See* MUNICIPAL CORPORATIONS, 3.

55 Vict. ch. 42, secs. 569, 579, 580, 585 (O.).]—*See* MUNICIPAL CORPORATIONS, 5.

55 Vict. ch. 48 (O.).]—*See* ASSESSMENT AND TAXES, 4.

55 Vict. ch. 48, sec. 119 (O.).]—*See* ASSESSMENT AND TAXES, 1.

55 Vict. ch. 48, secs. 121, 141, 142 (O.).]—*See* ASSESSMENT AND TAXES, 3.

55 Vict. ch. 48, sec. 123, sub-sec. 2 (O.).]—*See* ASSESSMENT AND TAXES, 2.

55 and 56 Vict. ch. 29 (D.) (Criminal Code), sec. 13.]—*See* LIQUOR LICENSE ACT 1—Secs. 197, 198, GAMING—Sec. 421, EXTRADITION—Secs. 559, 843, 850, 889, JUSTICE OF THE PEACE, 2—Sec. 641, CRIMINAL LAW, 2—Sec. 684, CRIMINAL LAW, 1—Secs. 865, 866—CONSTITUTIONAL LAW.

56 Vict. ch. 20 (O.).]—*See* DEVOLUTION OF ESTATES ACT, 2.

56 Vict. ch. 24 (O.).]—*See* LIEN.

57 Vict. ch. 37, sec. 39 (O.).]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

57 Vict. ch. 50, sec. 14 (O.).]—*See* STATUTES, 2.

57 Vict. ch. 55, sec. 22, sub-sec. 6 (O.).]—*See* STATUTES, 1.

58 Vict. ch. 34, sec. 12 (O.).]—*See* INSURANCE, 2.

58 Vict. ch. 68 (O.).]—*See* RAILWAYS, 2.

STREET.

Defect in.]—*See* MASTER AND SERVANT, 1.

Right of Way over, of Street Railway.]—*See* NEGLIGENCE, 3.

STREET RAILWAY.

Neglect to Sound Gong—Right of Way over Street.—See NEGLIGENCE, 3.

SURETY.

See PRINCIPAL AND SURETY.

SURROGATE COURTS.

Grant of Letters of Administration by, Cannot be Revoked by High Court.—See HIGH COURT OF JUSTICE.

TENANT.

Right to Fixtures.—See LANDLORD AND TENANT, 1.

TRUSTEE.

Appointment of, to School Board.—See PUBLIC SCHOOLS, 1.

VENDOR AND PURCHASER.

Contract to Buy from Administrators — Execution — Priority.—The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his life time issued execution thereon under an *ex parte* order therefor against the estate in the hands of the administrators:—

Held, that the execution formed no charge or encumbrance on the lands contracted to be sold.

Orders should not be made *ex parte* allowing issue of execution

against goods of a testator or intestate in the hands of an executor or administrator. *In re The Trusts Corporation of Ontario and Behmer*, 191.

VOLUNTARY SETTLEMENT.

See FRAUDULENT CONVEYANCE.

VOTERS' LIST.

Irregular Addition of Names to.—See MUNICIPAL ELECTIONS, 2.

WARRANT.

Of Arrest, Costs of.—See JUSTICE OF THE PEACE, 2.

Defective.—See EXTRADITION.

WATER AND WATER-COURSES.

1. *Easement—Artificial Stream—Dominant Tenement—Servient Tenement*—R. S. O. ch. 111, sec. 35.]—The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement: and the fact that the burthen has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement.

The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O. ch. 111, sec. 35.

Ennor v. Barwell, 2 Giff. 410, distinguished. *Oliver v. Lockie*, 28.

2. *Navigable Waters—Ice—Right of Free Passage Over—Action for Declaration of Right—Damages—Loss of Business.*—The defendant, the owner of certain water lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do :—

Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the Court for a declaration of right.

Gooderham v. City of Toronto, 21 O. R. 120, 19 A. R. 64, and *City of Toronto v. Lorsch*, 24 O. R. 229, followed :—

Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a *bona fide* mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice. *Cullerton v. Miller*, 36.

WAY.

1. *Toll Roads—Toll Chargeable on Intersected Road—Mandamus—R. S. O. ch. 159, secs. 2, 87, 157, 52 Vict. ch. 27 (O.).*—Section 87 of R. S. O. ch. 159, as extended by section 157 of that Act, and by 52 Vict. ch. 27 (O.) applies not only to toll roads owned or held by private companies, or municipal councils, but also to all toll roads purchased from the late Province of Canada, so that where one of such roads is intersected by another of them, a person travelling on the latter road, shall not be charged for the distance travelled from such intersection, to either of the termini of the intersected road, any higher rate of toll than the rate per mile charged by the company for travelling along the entire length of its road from such intersection, but subject to the production of a ticket, which he is entitled to receive from the last toll gate on the intersecting road, as evidence of his having travelled only from such intersection.

Mandamus granted to compel the issue of such tickets.]—*Smith v. The Corporation of the County of Wentworth*, 209.

2. *Road Companies—Negligence—“Done in Pursuance of this Act”—Limitation of Actions—“Within Six Months after the Fact Committed”—R. S. O. ch. 159, sec. 145.*—Where the defendants, a road company, incorporated under the General Road Companies' Act R. S. O. ch. 159, sec. 99 of which requires them to keep their road in repair, constructed a culvert across it with a post and rail guard at the mouth thereof in such an improper manner that the wheel of the plaintiff's carriage striking the post he was

thrown out of it into the open ditch at the end of the culvert and injured :—

Held, that the construction of the culvert and the guard was a thing “done in pursuance of the Act” within the meaning of section 145, and that therefore the time for bringing the action was limited to within six months after the date of the accident. *Webb v. The Barton Stoney Creek Consolidated Road Co.*, 343.

Defective.]—See MASTER AND SERVANT, 1.

WILL.

1. *Failure of issue—Meaning of*—*R. S. O. ch. 109, sec. 32.*]—By his will, testator devised to his son the use of and during his lifetime certain land, but if he died without issue, then it was to be equally divided between two named grandsons, and by a subsequent clause, on the death of testator’s widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him :—

Held, that under *R. S. O. ch. 109, sec. 32*, the failure of issue referred to was a failure during the son’s lifetime or at his death and not an indefinite failure, and that by virtue of the subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue.

Re Bird and Barnard’s Contract, 59 L. T. N. S. 166, and *Stobbart v. Guardhouse*, 7 O. R. 239, distinguished. *Martin v. Chandlar et al.*, 81.

2. *Legacy to Widow in Lieu of Dower—Right to Annual Specific Sum—Children of Deceased Child—Right to Parent’s Share—R. S. O. ch. 109, sec. 36.*]—A testator by his will bequeathed to his wife \$150 a year, payable half-yearly out of the rent of his farm until the sale thereof, when she was to be paid the interest on \$2,500 at 6 per cent., or the \$150. On the sale, \$2,500 was to be left on mortgage or invested by the executors at interest payable half-yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies were given to each of testator’s twelve children (one of whom was dead at the date of the will), to be paid out of the proceeds of the sale of the real estate. The residue of the deceased daughter’s legacy was directed to be placed at interest and divided equally between her surviving children on their attaining twenty-one years, and in case any of testator’s children died before receiving their full shares and leaving issue, the deceased’s child’s share was to be equally divided between his or her children; if such deceased child died without issue, his or her share was to be divided equally between his or her surviving brothers and sisters. All the residue of the estate, not thereinbefore disposed of, he gave to his children “and their issue as aforesaid provided for” to be divided equally between them from time to time as the money should become payable. The estate proved insufficient to provide for the annuity and payment of the legacies in full, and the annual interest obtainable on the \$2,500 was less than \$150 :—

Held, that there was a gift to the widow of \$150 a year, and not merely of the annual interest derivable from

the investment of the \$2,500, and that she was entitled to have it paid out of the residue in priority to the other legatees:—

Held, also that the deceased daughter's children were entitled to share in the residue. *Koch v. Heisey*, 87.

3. *Bequest to Poor of County—Town Detached from County for Municipal Purposes only—Right of Residents of Town to Participate in.*]

—The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county “who must have been *bonâ fide* residents of the said county before becoming destitute or needy.” A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—

Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. *Steele v. Grover*, 92.

4. *Bequest to Agricultural Society—Restrictions against Freemasonry, etc.—Impure Personality—Validity—Bequest to Promote Free Thought—Validity.*]

—By his will, testator directed his executors to invest \$2,000 and pay over the yearly interest to an Agricultural Society (incorporated under R. S. O. ch. 35, [1877] and thereby authorized to acquire and hold, but not to take by devise, real estate), to be applied as a premium for the best results in a specified mode of agriculture, but with a provision that all competitors should declare that they were neither Freemasons, Orangemen or Odd-

fellows; and, in case of neglect to comply with the conditions, the executors were to apply such yearly interest in procuring lectures against Freemasonry and other secret societies. The legacy was payable out of a mixed fund consisting in part of impure personality:—

Held, that the society came under the Mortmain Act, and so far as the bequest consisted of impure personality, it was void:—

Held, also, that the society was not bound to expend annually the interest received, but might apply it from time to time as deemed best, so long as it acted in good faith and did not divert the money from the purpose directed by the testator.

The executors were directed to invest the residue of the estate and to apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario:—

Held, that this bequest was void as opposed to Christianity.

Pringle v. Corporation of Napanee, 43 U. C. R. 285, followed. *Kinsey v. Kinsey*, 99.

5. *Construction—“Nearest of Kin”—Period of Ascertainment—Tenants in Common—“Then”—Dower—Election.*]

—In the absence of any controlling context, the persons entitled under the description “nearest of kin” in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue “then in that case” it should be equally divided between his “near-

est of kin ;" and the daughter died while still an infant and unmarried :—

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of the "nearest of kin ;" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common :—

Bullock v. Downes, 9 H. L. C. 1 ; *Mortimore v. Mortimore*, 4 App. Cas. 448 ; and *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, followed :—

The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and did not affect the construction of the will.

The widow remained in possession after the death of the testator, with her infant daughter, whom she supported out of the rents, until an order was made under R. S. O. ch. 137 permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant :—

Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was therefore entitled to dower out of the farm in addition to the one-third in fee simple. *Brabant v. Lalonde et al.*, 379.

6. *Executory Devise—Happening of Event—Vested Estate.*—A testator devised a farm to his executors in trust for his grandson, with power to sell and apply the proceeds for his benefit : and in case he died before attaining twenty-one they were to

transfer the land or, if sold, the balance of the proceeds to his father. The father died before his son, who died before attaining twenty-one, without issue. The land was not sold :—

Held, that the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, which had become impossible, and that his estate had become absolute. *Parkes v. The Trusts Corporation of Ontario et al.*, 494.

7. *Executory Devise—Residuary Devise—Effect of—Vendor and Purchaser.*—A testator devised certain land to his son W. during his lifetime ; and in the event of his death, leaving his wife surviving him, he devised the rents, issues and profits to her during her lifetime or widowhood ; but in the event of both dying within thirty years from his death, in such case he devised the rents and profits thereof, until the expiration of such thirty years, to W.'s children equally, share and share alike ; and after W.'s death, and after the death or remarriage of his said wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same after the specified periods to them, their heirs and assigns forever. By the last clause of the will, the testator gave all the residue of his estate, real, personal and mixed, of whatever nature or kind soever, and not otherwise disposed of by his will, to W., to have and to hold the same to him, his heirs and assigns forever.

The testator died on the 9th of January, 1876 ; W. and his wife both survived testator and enjoyed their life estates, and died leaving children still surviving :—

Held, that under the will the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence shewing whether or not W. had disposed of the land, the children could not impart a good title in fee. *Re Garbutt and Roundtree*, 625.

8. *Construction—Charitable Bequest.*—A testator by his will bequeathed to his executors out of his pure personalty the sum of \$10,500, to be paid by them as follows: “\$3,500 to Wycliffe College, \$3,500 to the Bishop of the Diocese, of Algoma for the support of missions of the said Diocese, and the balance, to wit, the sum of \$3,500 towards the support of any mission or missions which may be undertaken or established by the Rev. Edward F. Wilson, the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere”:—

Held, (1) that the bequest of the sum for the support of missions to be undertaken was not a bequest to the Rev. Edward F. Wilson personally, but to the executors for the support of the missions.

(2) That it was a good charitable bequest, and referred to missions connected with the spread of religious teaching either in a field or locality of missionary work.

In re Jarman's Estate, *Leavers v. Clayton*, 8 Ch. D. 584, and *In re Riland's Estate*, *Phillips v. Robinson*, W. N. 1881, p. 173, distinguished. *The Toronto General Trusts Company v. Wilson et al.*, 671.

Capacity of Indian to Make.—See INDIANS.

Power to Extend Benefit of Insurance Policy by, Restricted.—See INSURANCE, 2.

WORDS.

“*Actual and Continued Change of Possession.*”]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

“*A person claiming right thereto.*”]—See WATER AND WATERCOURSES, 1.

“*Demised Premises.*”]—See LANDLORD AND TENANT, 2.

“*Desirable in the Public Interest.*”]—See MUNICIPAL CORPORATIONS, 3.

“*Done in Pursuance of this Act.*”]—See WAY, 2.

“*False Document.*”]—See EXTRADITION.

“*Fixtures.*”]—See LANDLORD AND TENANT, 1.

“*Injuriouly Affected.*”]—See RAILWAYS, 2.

“*Lawfully Payable.*”]—See RAILWAYS, 3.

“*Liquors Drunk in a Tavern or Alehouse.*”]—See DIVISION COURTS, 4.

“*Nearest of Kin.*”]—See WILL, 5.

“*Owner.*”]—See RAILWAYS, 1.

“*Person Aggrieved.*”]—See PARLIAMENTARY ELECTIONS.

“*Renewal Premiums.*”]—See INSURANCE, 3.

“*Renewal Receipts.*”]—See INSURANCE, 3.

"Running at Large."—See DISTRESS.

"Subject to Devise."—See JUDGMENT, 3.

"Such Liquors."—See DIVISION COURTS, 4.

"Taken."—See ARBITRATION AND AWARD, 2.

"Then."—See WILL, 5.

"Then in That Case."—See WILL, 5.

"Way Used in the Business of the Employer."—See MASTER AND SERVANT, 1.

"Wilful."—See PARLIAMENTARY ELECTIONS.

"Within Six Months after the fact Committed."—See WAY, 2.

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